United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

68

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,217

ALTON & SOUTHERN RAILWAY COMPANY, et al.,

Plaintiffs-Appellees,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.,

Defendants.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

Defendant-Appellant.

Appeal From a Preliminary Injunction Issued by the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the court below erred in granting the carriers' motion for a preliminary injunction, more specifically:

a. Whether, under the Railway Labor Act, unions which have engaged in "national handling" of a major dispute with numerous carriers, but have exhausted the negotiating procedures of the Act without reaching agreement, may engage in a "selective" strike (i.e. against some, rather than all, of the carriers) in support of their demands.

b. Whether a strike in these circumstances is permissible where the unions' sole reason for not striking all the carriers is their realization that Congress would act promptly to forbid any effort to engage in a nationwide railroad strike.

STATEMENT PURSUANT TO RULE 8(d)

This case has not previously been before this Court.

REFERENCES TO RULINGS

The opinion of the court below, explaining its decision to issue a preliminary injunction, was filed on March 2, 1970,

appears at pages 330-348 of the Appendix,[1] and is unofficially reported at 73 LRRM 2594. The preliminary injunction itself, issued on the same day, appears at A349-350, and is unofficially reported at 73 LRRM 2600.

STATEMENT OF THE CASE

Introduction

In this case, four railroad unions participated in "national handling" of a major dispute with 128 railroad carriers, but exhausted the negotiating procedures of the Railway Labor Act[2] without reaching agreement. Realizing that they could not conduct a strike against all 128 carriers (because over the past decade Congress has legislated immediately to forbid each threatened nationwide railway strike), the unions elected the only form of self help realistically available to them: they called a strike against a single carrier in support of their demands.

The 128 carriers immediately instituted the present action, alleging inter alia that any strike against fewer than

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1/ Appendix references are hereinafter cited as "A" followed by the relevant page number.

2/ The Railway Labor Act is codified at 45 U.S.C. §§151 et seq. Relevant provisions are quoted later in this statement of the case.

all of them constituted a violation of the Railway Labor Act, and sought temporary and preliminary injunctions against any such strikes. The court below held that once the unions had pursued national handling to exhaustion, they could strike only the entire carrier group, and that a strike against fewer than all of the carriers violated Sections 2 First and Second of the Act, 45 U.S.C. §152 First and Second.[3/] Accordingly, the court below issued a preliminary injunction forbidding the unions from striking "the Union Pacific Railroad or any other selected carrier."

The practical effect of this preliminary injunction was to destroy altogether the unions' right to strike in support of their demands. Deprived by the injunction of the right to strike selected carriers, the unions announced a strike against all 128 carriers. Congress immediately enacted legislation banning such a strike, in response to a Presidential plea that "a nationwide stoppage of rail service ... must not be permitted to take place." Ultimately, Congress legislatively imposed the very terms and conditions which the unions had sought to avoid by their strike.

Appellant, one of the four unions thus enjoined, has filed this appeal, contending that the issuance of the injunction

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3/ These sections are quoted infra at n 15.

was erroneous as a matter of law.

Events Preceding the Filing of this Lawsuit

Appellant is one of four shopcraft unions which together represent 45,000 workers employed on the 128 Class I railroads operating in the United States (A 332).[4] On November 8, 1968, each of these unions sent identical notices to each of the 128 carriers, pursuant to Section 6 of the Railway Act, 45 U.S.C. §156,[5] proposing changes in general wage rates and other wage adjustments for those employees represented by the unions (A 332, 51-54, 16-17). Each of the notices requested joint conferences at "the earliest practicable date" between the four unions and the individual carrier (A 51, 332),

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4/ Appellant represents approximately 6,000 of these workers. The other three shopcraft unions involved are International Association of Machinists and Aerospace Workers, International Brotherhood of Electrical Workers, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

5/ Section 6 provides, insofar as pertinent here:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions ..."

but added that, if negotiations on an individual carrier basis failed to result in agreement, the unions requested that they then be referred to national handling between the unions and representatives of all the carriers. 6/

On November 26, 1968, each of the carriers served Section 6 notices on the unions, proposing substantial changes in work rules (A 333, 55-58), to be bargained about concurrently with the unions' proposals (A 16, 333).

Thereafter, negotiations commenced on an individual carrier basis, but by mid-March, 1969, no agreements had been

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6/ Specifically, the Notices stated:

> "... In the event that we are unable to reach an agreement upon the foregoing request [for wage changes] at such joint conferences, we further propose that the matter be handled on a joint national basis.
>
> "On the assumption that an agreement may not be reached in our joint conference, the organizations serving this identical Notice on the various carrier managements have created the Employes' Conference Committee composed of the International Officers or their representatives, of the organizations serving this identical Notice.
>
> "In the event an agreement is not reached with this carrier, we request that you join with other carrier managements who are receiving identical Notices, in the creation of a Carriers' National Conference Committee, to negotiate in accordance with the procedures of the Railway Labor Act, as amended, the subject matter of this Notice." (A 51-52).

reached (A 17, 333). Accordingly, on March 17, 1969, the parties commenced bargaining on a national basis (A 17, 333). The carriers were represented by the National Railway Labor Conference (hereinafter the "NRLC"), assisted by three regional Carriers' Conference Committees (A 15, 17, 333).

National negotiations likewise failed to produce agreement, and on April 10, 1969, the parties jointly requested the services of the National Mediation Board (hereinafter "NMB") pursuant to Section 5 First of the Railway Labor Act, 45 U.S.C. §155 First[7] (A 17, 333). The NMB docketed the dispute on April 14, 1969 (A 17), commenced mediation efforts on June 18, 1969 (A 18), but these, too, failed to produce agreement (A 333, 18).

On August 19, 1969, the NMB requested the parties to submit their dispute to voluntary arbitration (A 334, 18).[8] The

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7/ Section 5 First provides that either party may request the services of the NMB, in which event the NMB "shall use its best efforts, by mediation, to bring them to agreement."

8/ Section 5 First provides that if the NMB fails to achieve a settlement through mediation, "The said Board shall at once endeavor as its final required action ... to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter." The arbitration provisions are set forth in Sections 7 and 8 of the Act, 45 U.S.C. §§157, 158.

carriers accepted the proffer on August 21 (A 18, 334). The unions refused arbitration on August 22 (A 18, 334), as they were lawfully entitled to do. (Section 7 First of the Act, 45 U.S.C. §157 First, provides that "the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise"). The NMB thereupon advised the parties that its mediatory efforts had failed, and on September 3, 1969, relinquished jurisdiction over the dispute (A 18, 334).

Under the Act, the parties are required to maintain the status quo for 30 days after the NMB relinquishes jurisdiction, but thereafter are free to resort to self-help unless in the interim the President invokes an emergency board (Section 5, First). The unions announced that they intended to strike seven of the carriers upon expiration of the 30-day waiting period (A 334, 18). The remaining carriers (except for the Penn Central and its subsidiaries) countered that they would lock out their employees in the event of such a strike (A 18, 334).

However, on October 3, 1969, the last day of the waiting period, the President, pursuant to Section 10 of the Act, 45 U.S.C. §160, created an emergency board to investigate the dispute. This had the effect, inter alia, of requiring the parties to continue maintenance of the status quo until 30 days

after the emergency board rendered its report.[9] Consequently, the announced seven-carrier strike, and lockout, did not occur.

Proceedings before the emergency board commenced on October 6, 1969, and continued thereafter through the remainder of the month (A 61-62). The board undertook mediatory efforts (A 62), and concluded in its final report issued on November 2 that "the framework of a possible agreement ... has started to emerge from [the parties'] discussions" (A 70). The Board

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9/ Section 10 provides, in pertinent part:

> "If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute ... Such board ... shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.
>
> * * *
>
> "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

further advised:

> "Clearly, the parties have a long and difficult road still to travel before they can reach agreement. The possibility of an eventual impasse is still very real. It is our belief and our recommendation, however, that the parties should continue their bargaining during the coming weeks in an effort to reach agreement and avoid the need for further governmental intervention." (A 70)

In the course of its report (A 59-97), the emergency board isolated the critical issues which were dividing the parties. The unions wanted greater wage increases than the carriers were offering (A 71-78); the carriers wanted relief from the workrules which forbade assigning repair work across craft lines (A 79-82). The board pointed out that these respective interests could be accommodated:

> "One ... avenue to special [wage] increases lies in the negotiations now in progress in the work rule area... To the extent and degree mutually satisfactory modifications of rules are negotiated, appropriate wage adjustments could be made. Wage increases justified by modifications in rules which, through improved organization of work, contribute to efficiency, productivity, and cost reduction would not be incompatible with earlier wage settlements. On the contrary, the Board is of the opinion that negotiations of this character should be encouraged in the industry." (A 74).

This report issued on November 2, 1969, and thereafter the parties negotiated along the lines it recommended.[10] Although the 30 day waiting period expired on December 2, and

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10/ The district court's finding (A 334) that the shopcraft unions refused to accept the board's recommendations is not supported by the record and, indeed, is refuted by the subsequent events recited in its decision (A 335).

the unions, having exhausted all of the Act's procedures, at last were free to exercise self help, they continued negotiating and did not strike (A 20).

On December 4, 1969, the parties' negotiators arrived at a Memorandum of Understanding (A 131-138), which they initialed, subject to ratification by the members of each of the unions (A 335, 20-21). The Memorandum adopted the emergency board's wage recommendations (A 131-132), and in addition established an "incidental work rule" (A 134-135) permitting the carriers in certain circumstances to assign work across craft lines where such work is "incidental" to that being done by members of another craft.

The negotiators for each of the unions recommended that their members ratify the Memorandum (A 144-145). The members of three of the unions ratified, but appellant's membership rejected the settlement (A 335, 21). The reason for rejection was the members' dissatisfaction with the incidental work rule. As appellant's principal negotiator later testified, its members feared that the rule would have its principal impact upon their craft with a resultant elimination of many of their jobs (A 335, 37).[11/]

11/ The manner in which the rule would adversely affect the employment opportunities of appellant's members was explained in detail in the testimony of appellant's Vice President, J. W. O'Brien, before the Senate Labor and Public Welfare Committee. Hearing on S.J. Res. 178, "Railway Shopcraft Dispute, April 1970), pages 14-113 (April 2, 1970; 91st Cong., 2d Sess.).

With the rejection by appellant's membership, the agreement failed as to all four unions (A 21). Neither the carriers nor the other unions were desirous of signing a contract which excluded appellant; as the carriers explained below, they would not sign with the other three unions because the right to assign across craft lines would not be meaningful unless appellant were a party to it (A 198, 327).[12/]

Negotiations resumed, with the unions seeking elimination of the incidental work rule (A 21). The carriers refused and the parties soon deadlocked (A 21).

On January 31, 1970, at 12:01 A.M., the unions struck the Union Pacific Railroad (A 193, 335). Although the carriers asserted that the purpose of the single carrier strike was to coerce Union Pacific into withdrawing from national handling and renouncing the NRLC as its bargaining representative (e.g. A 22, 195, 201), no evidence was introduced to support these assertions. Thus, the unions never requested that Union Pacific bargain other than through NRLC, nor did they ask it to withdraw from national handling. On the contrary, the unions' principal negotiator explained that the only reason the unions resorted to a single carrier strike rather than a nation-wide strike was their

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12/ Indeed when, later, the three unions offered to execute the agreement, the carriers refused (A 325, 326-327).

realization that Congress would not permit the latter (A 185-186):

> "[I]rrespective of the Carriers' or their chief negotiator's [Hiltz'] characterization of the Unions' strike on the Union Pacific Railroad on January 31 as a 'whipsaw' strike, the facts are (1) the strike was called on a single carrier and not against all carriers only because it has become clear beyond dispute that a nationwide strike of all railroads will not be permitted by the United States Government and that this was evidenced by the action of the Congress halting the Shopcrafts' strike in 1967 against the entire carrier bargaining group; (2) the so-called right to strike the 'multi-employer' combine thus is a myth and the implicit right of the unions, after exhaustion of all required procedures under the Railway Labor Act, to resort to self-help by strike action is completely negated unless serious disruption to the public is avoided by selective carrier strikes; (3) that this is in fact the purpose of the single carrier strike by the unions on January 31, 1970, and not the purpose as ascribed by deponent Hiltz; (4) that the ... unions categorically deny that it is their purpose to interfere with the carriers' choice of bargaining representatives and the carrier struck on January 31, 1970, is free to designate anyone it chooses to bargain on its behalf..."

As another shopcraft union leader put it (A 201):

> "Either the industry withdraws that workrule or we will strike the Union Pacific or some other railroad." (Emphasis added).

Subsequent events corroborate the union leaders' claims. Notwithstanding the strike of the Union Pacific on January 31, the unions continued to negotiate thereafter on a national handling basis looking toward a national settlement (A 198, 323, 335-336), and not once did they ever seek bargaining on any other basis.[13/]

13/ Most telling in this respect is the affidavit of Glen L. Farr, Vice-President, Labor Relations of Union Pacific Railroad, written two weeks after the January 31 strike (A 192-196). Farr recites no effort by the unions to engage it in individual bargaining.

The Litigation in the Court Below

Almost immediately after the strike on the Union Pacific commenced, the remaining carriers announced that they would cease operations at 10:00 P.M. on January 31, 1970. The unions instituted an action in the court below (Civil No. 298-70) asserting that such a lockout would be violative of the Act, and sought a temporary restraining order (A 331, 335, 336-337). The carriers, in turn, instituted the present action, alleging that the strike should be enjoined for three reasons, one of these reasons being that it was against fewer than all the carriers (A 335, 338-339).[14/] The carriers, too, sought a temporary restraining order (A 10-11).

A hearing was held before Judge Sirica at 4:00 P.M. on January 31, 1970, on the two motions, following which he granted both temporary restraining orders (A 335). He explained that each side had convinced him that there was a "substantial likelihood" it would prevail in its claim that the other was violating the law (A 182). Within a few hours, the unions had removed all pickets on the Union Pacific Railroad (A 193). Having waited nearly 15 months for the right to strike,

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14/ The other two allegations, which the court below did not reach (A 347-348) were that the unions had bargained in bad faith by conditioning acceptance of the Memorandum upon membership ratification (A 338), and that the unions had not exerted every "reasonable effort" to settle a particular wage issue (A 338-339).

the unions' strike had lasted less than one day. Although the underlying dispute was never resolved in negotiations, the unions never were afforded another opportunity to strike.

The TRO's originally were scheduled to expire on February 10, 1970 (A 141), but the parties voluntarily agreed to their extension for an additional ten days (A 190-191) in order to give the Department of Labor a chance to try to mediate the dispute. Efforts to settle under the auspices of the Secretary of Labor continued until February 19, 1970, but ultimately failed (A 323, 325, 326-328).

On February 20, 1970, the parties were back in court for the hearings on their respective motions for preliminary injunction (A 236-321). At the close of the hearing the court took the matter under advisement, and extended the TRO's until March 2, 1970 (A 319, 322).

The Decision Below

On March 2, 1970, Judge Corcoran rendered his decision on the motions for preliminary injunction (A 330-348). He ruled that the unions had violated Sections 2 First and Second of the Act by striking less than all the carriers (A 344)[15/] and on that ground enjoined any strike "against the Union Pacific Railroad or any other selected carrier over any dispute arising from the Section 6 notices served on or about November 8 and November 29, 1968" (A 349-350). The unions' motion to enjoin the threatened lockout was dismissed as moot, because the carriers had asserted an intention to lock out only in response to a selected strike (A 347).

In reaching his conclusion that the selective strike was unlawful, Judge Corcoran reasoned as follows. First, he

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15/ Section 2 First provides:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2 Second provides:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

held that national handling of all negotiations between the shopcraft unions and the 128 carriers is "obligatory" (A 341-343)[16]. From this premise, he concluded that any strike which is less than nationwide constitutes "bad faith bargaining" (A 344):

> "The duty laid out in Section 2 First is 'the heart of the Railway Labor Act.' Railroad Trainmen v. Terminal Co., supra, 394 U.S. at 377-378. By initiating and negotiating the dispute on an obligatory national basis and then striking the carriers on an individual basis it seems clear that the unions have violated their duty to 'exert every reasonable effort to make ... agreements ... and settle disputes.' Having begun on a national level, it is incumbent upon the parties to continue to deal on a national level even after the procedures of the Railway Labor Act have been exhausted. To act otherwise would take on the character of bad faith bargaining.
>
> "'What constitutes good faith bargaining in the railroad insutry is colored by how the parties have actually bargained in the past.' Brotherhood of Rail road Trainmen v. Atlantic Coast Line R. Co., supra, 383 F. 2d at 229. Considering the history of national handling of this and past disputes and the present pattern of negotiations, the shopcraft unions' action in striking an individual carrier exhibits bad faith which also violates Section 2 First.[7]
>
> "The Court interprets Section 2 Second as well to mean that once negotiations have begun on an obligatory national basis the negotiations must continue until the dispute is settled on that basis. To hold otherwise would work an unreasonable burden on the carriers and the entire concept of collective bargaining.
>
> "[7] 'The requirement of good faith bargaining is really a requirement of absence of bad faith.' American Airlines, Inc. v. Air Line Pilots Ass'n., 169 F. Supp. 777, 794 (S.D. N.Y. 1958)."

16/ While reversal of this holding is not essential to secure reversal of the decision below, we believe it to be wholly erroneous. Prior to this dispute, there had been no national handling of "incidental work" disputes for nearly 50 years (A 12-13), and such accommodations as had been reached during that period had been accomplished on a single carrier basis (A 81). In light of that history, national handling was not obligatory. Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Company, 127 U.S. App. D.C. 298, 383 F. 2d 225, 229 (1967).

Finally, Judge Corcoran found "support" for his conclusion in the decisions under the National Labor Relations Act, which he construed as holding "that a union violates the National Labor Relations Act when it begins bargaining on a multi-employer level and then attempts to force individual agreements by whipsaw striking individual members of the multi-employer unit" (A 345). (In fact, the decisions under the NLRA stand for precisely the opposite conclusion, as we show in the argument herein).

Judge Corcoran apparently rejected the carriers' claim that the purpose of the strike was to force Union Pacific to renounce NRLC as its bargaining agent and/or to force it out of the "multi-employer unit." The carriers had contended that the strike violated not only Sections 2 First and Second, but also Section 2 Third (A 338). This latter section provides, in relevant part:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives."

Plainly, if the court had found that the strike had the purpose claimed by the carriers, there would have been a much more evident violation of this section than of Sections 2 First and Second. Nevertheless, although aware that the carriers were asserting a violation of this section (A 338), Judge Corcoran did

not find such a violation.

Events Subsequent to the Decision Below

The sad fate which befell the unions following the decision below is a matter of public record, spread balefully across the annals of Congress.

"On March 2 the court issued a preliminary injunction against a strike of the Union Pacific or any select carrier, whereupon the unions called a nationwide strike to take place at 12:01 A.M. on Thursday March [5]." S. Report No. 91-717, 91st Cong., 2d Sess. (1970), page 2. 17/

On March 3, President Nixon sent a message to Congress, accompanied by legislation which would impose a settlement of the shopcraft dispute. The message began:

> "Once again this nation is on the brink of a nationwide rail strike.
>
> "A nationwide stoppage of rail service would cause hardship to human beings and harm to our economy, and must not be permitted to take place." (Senate Hearing, "Railway Shopcraft Dispute, March 1970", supra n. 17, at page 2 (hereinafter "March Hearing")).

Under the President's proposed legislation (March Hearing, pages 4-5) Congress would declare that the memorandum initialed in

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17/ The report gives the date as "Thursday March 4." However, Thursday was March 5, and that is indeed the date for which the strike was called, as confirmed by Secretary of Labor Shultz. Hearing on S.J. Res. 178, "Railway Shopcraft Dispute, March 1970", page 6 (March 4, 1970; 91st Cong., 2d Sess.).

December, 1969 "shall have the same effect (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties."

Hearings were held on the proposal on March 4. Secretary of Labor Shultz testified (Id., page 7):

> "This Nation cannot tolerate a nationwide railroad strike."

He added that a nationwide railroad strike would be a "nationwide disaster." (Id., page 15).

Secretary Shultz further testified that the negotiations had reached an irrevocable impasse. He was "convinced that every effort of voluntary avoidance of a nationwide walkout ... has been exhausted" (Id., page 25); he saw "no prospect" for resolving the dispute through further negotiation (Id., page 26); he summarized the status as follows (Id., page 30):

> "I should say that over the past few months a tremendous effort has been made by the parties to work out this agreement, and I can only compliment the union negotiators and the company negotiators for the efforts they have made. There has been a tremendous effort on everyone's part.
>
> "... [A]s of now, with all the extensions and all the effort, I think all parties are just at their wit's end."

Finally, he added (Id., page 33):

> "The negotiations have been going on 14 months, some with great intensity, and as of the moment I believe everyone has a sense that we have just come to the end of the road. There has been no lack of trying ..."

The Unions' principal negotiator testified to the unhappy plight the unions found themselves in after Judge Corcoran's decision issued (Id., pp. 71-73):

> "We know ... that this Nation cannot, and normally will not, stand for a nation-wide transportation crisis on the rails. And I could say that in that connection that we have spent the entire period that these negotiations have consumed trying to avoid that.
>
> "In every utterance we have made from the outset, to the carriers and to all the officials of Government with whom we have dealt, we have reiterated over and over that we did not want to cause a broad-based strike in this industry on a basis which would deprive any section of this country of essential transportation services, which is the precise expression, I think, from the Railway Labor Act.
>
> "Our plan was that if work stoppages ultimately became necessary, that they would be restricted, and while that became characterized in some quarters as 'whipsaw' strikes, we have referred to them as 'selective' strikes.
>
> "We still believe that is a basis upon which the matter can properly be handled, but Federal Judge Corcoran here in the Federal district court did not agree with our feeling in that regard. And when he enjoined us the other day from conducting anything other than a total strike against all 128 of the railroad participants in the dispute, all of our alternatives were effectively shut off at that point, and we had no choice, therefore, but to announce a strike.
>
> * * *
>
> "We do not want to conduct a national strike in this industry. But we feel that every other alternative has been shut off to us."

Congress did not at that time adopt the President's proposed legislation. Instead, on March 4, it enacted Public

Law 91-203, S.J. Res. 180, which merely banned any resort to self-help for an additional 37 days, until April 11, 1970 (Id., p. 103). Congress took this temporizing step because it felt that "further time is necessary, both for the Congress to fully consider the implications of this proposal, and other alternative proposals for settlement of this dispute, and also will provide additional time for further bargaining between the parties." S. Report No. 91-717, supra, p. 1.

On April 2, 1970, the parties appeared before the Senate Committee once again. "The committee heard from the Secretary of Labor, and representatives of the carriers and each of the unions involved. Each of the witnesses reported that the parties had been unable to settle the dispute through collective bargaining, and that there was no significant likelihood that the dispute would be resolved voluntarily in the future." S. Report No. 91-758, 91st Cong. 2d Sess. (1970), p. 3.

On April 9, 1970, Congress enacted Public Law 91-226, S.J. Res. 190, declaring, as the President had proposed in March, that the memorandum initiated in December, 1969 "shall have the same effect (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties."

Thus, 17 months after it served the Section 6 notices, appellant had imposed upon it by Act of Congress an "agreement" which its members had voted to reject, and as to which the de-

cision of the court below had effectively removed all opportunity to resist by resort to self-help.

ARGUMENT

Introduction and Summary

This case poses the question whether the nation's railroad employees have any right to strike over matters which they elect to commit, or are obligated to commit, to national handling.[18] It is clear beyond peradventure of doubt that Congress will not permit a nationwide railway strike. Since 1963, a nationwide railway strike has become imminent three times, and each time Congress has enacted legislation to forbid it.[19] The President has declared that a "nationwide stoppage of rail service ... must not be permitted to take place" (supra, p. 18); the Secretary of Labor has testified that "This Nation cannot tolerate a nationwide railroad strike" (supra, p. 19); and Congress has agreed that a nationwide railway strike would result in "catastrophe" (S. Rep. No. 91-758, supra, p. 2).

18/ Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co., 383 F. 2d 225, 229 (D.C. Cir. 1967).

19/ The first two occasions are described in the opinion below (A 337, n. 3). The third is the aftermath of the instant case.

It follows that railroad employees have a viable right to strike only to the extent that they can strike one or a few carriers and thereby preclude the calamitous impact of a nationwide strike. But the court below has ruled that, following national handling, any strike short of a nationwide strike violates the Railway Labor Act. Since national handling is the universal and necessary procedure for dealing with many of the basic issues (such as wages) throughout the railroad industry (A 9-16, 352-343), the decision below would effectively destroy the right to strike over all such issues. We submit that this result is not only intolerable, but would vitiate a right which is fundamental to the effective operation of the Act. "The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless" if the right to strike were removed. Railroad Trainmen v. Terminal Co., 394 U.S. 369, 381 (1969).

In this case railroad unions straightforwardly developed a program to preserve the right to strike. They openly and candidly asserted that they would confine their strike to one or a few carriers for the very purpose of avoiding the consequences which follow automatically upon the threat of a nationwide strike. The court below has branded that program "bad faith bargaining." We show in this brief that the decision below is wrong as a matter of law.

First, we will demonstrate the Congress intended that railroad unions have the traditional right to strike as the ulti-

gate means for resolving labor disputes in the railroad industry; that Congress did not wish that right to be whittled away through the device of branding its exercise "bad faith bargaining"; and that the conduct of the unions here fully complied with the Railway Labor Act's requirement of good faith.

Thereafter, we will demonstrate that under the National Labor Relations Act unions may engage in strikes against part of a multi-employer unit and that, following an impasse in multi-employer negotiations, they may seek contracts from the individual employers. We will argue that by analogy the same rights should be available to unions under the Railway Labor Act. We will show that the court below, in concluding erroneously that NLRA decisions "support" his holding, was relying on decisions which are wholly inapposite (i.e. where unions sought to break up multi-employer bargaining prior to an impasse being reached).

1. The Railway Labor Act Does Not Prohibit Strikes Against Individual Carriers After the Statutory Procedures Have Been Exhausted On A National Handling Basis.

In this case, the unions negotiated in good faith through all the statutory procedures, at the outset with the individual carriers and thereafter on a national handling basis. The court below found that those procedures had been exhausted (A 334), and that the unions were entitled to engage in self-help (A 341). Nevertheless, the court concluded that the particular kind of self-help employed by the unions constituted

"bad faith bargaining" (A 344). This reasoning is wholly untenable. As we will show, the Railway Labor Act does not prohibit the conduct employed by the unions here.

In the present case, thirteen months elapsed between the filing of the unions' Section 6 notices and the date they first became entitled to invoke self-help.[20/] This lengthy delay is not atypical; it is one of the "realities of the Railway Labor Act." Brotherhood of Railroad Trainmen v. Akron & B.B.R.Co.,128 U.S. App. D.C. 59, 385, F. 2d 581, 597 (1967), cert. denied 390 U.S. 923 (1968). "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." Railway Clerks v. Florida E.C. R. Co., 384 U.S. 238, 246 (1966).

While resort to self-help thus is delayed, it is available should the statutory procedures fail to resolve the dispute. Indeed, that availability is crucial to the "effective implementation of the Act's processes", for the "disputant's positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or

---

20/ The Section 6 notices were served on November 8, 1968. The statutory procedures were exhausted on December 2, 1969, thirty days after issuance of the emergency board's report. The unions did not actually resort to self-help until January 31, 1970.

abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a [court] would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike." Railroad Trainmen v. Terminal Co., 394 U.S. 369, 380-381 (1969). Thus the decision below, by effectively destroying the right to strike, will render "meaningless" the "entire scheme for the resolution of major disputes." Id. at 381.

Of course, the strike "has been the ultimate sanction of the union" under the Railway Labor Act. Railway Clerks v. Florida E.C.Ry. Co., 384 U.S. 238, 244. "[W]hen the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each [party]. On the side of labor, it is the cherished right to strike." Railroad Trainmen v. Terminal Co., supra, 394 U.S. at 384.

The courts have made clear that few restraints, if any, impede the utilization of self-help under the Railway Labor Act once the statutory procedures have been exhausted. The Second Circuit has stated that at that point "the controversy will be left entirely to the interplay of economic forces without further governmental intervention. The parties are then free from all compulsion under the Act ..." Pan American World Air. v. Flight Eng. Intern. Assoc., 306 F. 2d 840, 846 (2d Cir. 1962).

From this it concluded:

> "It follows that no injunction can issue under the Act against a strike which is undertaken after the mediation processes of the Act have been completed and the time limit which is provided has elapsed." (Ibid).

The Supreme Court, too, has found the Railway Labor Act very permissive in the scope of self-help allowed to the parties. Noting that this Act, unlike the NLRA, expresses no limitation on the forms of self-help available, it has concluded that even secondary boycotts which would be unlawful if committed by a union covered by the NLRA are permissible here. Railroad Trainmen v. Terminal Co., supra, 394 U.S. at 393. In general terms, it has construed the Railway Labor Act "to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." (Id. at 392; emphasis added).

Of course, here the carriers argue, and the court below held, that the unions' strike did conflict with another obligation imposed by federal law -- the obligation to bargain in good faith. That conclusion, however, cannot withstand scrutiny.

The test of good faith under the Railway Labor Act

was explained by this Court in Akron & B.B.R.Co., supra, 385 F. 2d at 597:

> "The standard for good faith bargaining is quite liberal ... Judge Bryan, after the most careful analsis, formulated the following frequently quoted standard that the --
>
> > requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. American Airlines, Inc. v. AirLine Pilots Ass'n., 169 F. Supp. 777, 794 (S.D. N.Y. 1958)." (Emphasis added).

Surely it is inconceivable that under this standard the unions were acting in "bad faith." They had pursued thirteen months of good faith negotiations through every step of the statutory procedure; they waited nearly two months after the right to strike accrued before exercising it, and then only as their last-ditch effort to get a final agreement; and they called a selective strike, rather than a nationwide strike, only because they knew from past experience that the latter was not realistically available to them. Although the court below professed to find the selective strike a threat to national handling, the record unequivocally demonstrates that the unions continued to participate in national handling after the strike.

Stripped to essentials, the court below enjoined the strike because in its view "good faith" requires a symmetry between the scope of the bargaining and the size of the battlefield. Since the unions had bargained on a national basis, the court reasoned, they must strike on that basis as well. We know of nothing which commands this simplistic approach. Indeed if transferred from a multi-employer to a single-employer context, its implications would be absurd. Unions frequently negotiate with an employer on a multi-plant basis, yet ultimately strike at only some of those plants. It has never before been suggested that such selectivity manifests "bad faith." Indeed, it is ironic that under a statute which commands the parties to "exert every reasonable effort ... to avoid any interruption of commerce or to the operation of any carrier", Section 2 First, unions should be found to have violated that very provision because they struck one carrier rather than 128.

In the final analysis, what the court below did was to measure the unions' "good faith" not by their performance at the bargaining table, but rather by the weapons they brought to bear to win the dispute. Perhaps the court was lulled into this approach by the carriers' fervent pleas (A 18-20, 195) that a selective strike would tip the scales of self-help too heavily in the unions' favor. Whatever prompted it, the court's

determination of "bad faith" from the nature of the unions' self-help transgressed the line so clearly drawn by the Supreme Court in NLRB v. Insurance Agents, 361 U.S. 477, 490 (1966):

> "... The scope of §8(b)(3) and the limitations on Board power which were the design of §8(d) are exceeded, we hold, by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table ... but solely and simply because tactics designed to exert economic pressure were employed during the course of the good faith negotiations. Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract ... Our labor policy ... does [not] contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union."

Finally, the carriers argued below that the unions manifested bad faith because they sought by the selective strike to obtain an individual contract from Union Pacific. No evidence was introduced to support the factual predicate of this claim, and it is not clear from the opinion below whether the court accepted it. In any event, we submit that as a matter of law unions may seek individual agreements once national negotiations have reached an impasse. That has always been the rule under the NLRA, and it is commended by common sense. Once national negoti-

ations reach impasse, the only hope for escaping economic warfare is through agreement on an individual basis. As the NLRB has reasoned, prohibiting efforts to obtain individual agreement following impasse "is inconsistent with the basic policy of the Act to encourage the practice and procedure of collective bargaining, as it would prevent the parties to a labor dispute from exhausting the possibilities of settling their dispute by collective bargaining rather than economic attrition." Morand Brothers Beverage Co., 91 NLRB 409 (1950), enforced 190 F. 2d 576 (7th Cir. 1951) and 204 F. 2d 529 (7th Cir. 1953), cert. denied 346 U.S. 909 (1953)[21/]

Moreover, in the particular circumstances of this case, where the parties commenced their bargaining on an individual carrier basis, and referred it to national handling only after individual bargaining had failed to resolve the dispute, it seems particularly appropriate that when national handling fails they might try again on the individual basis they had selected at the outset.

21/ We wonder how far the carriers' doctrine goes. Once the statutory procedures have been exhausted, the carriers become entitled, within limits (Railway Clerks v. Florida E.C.R. Co., 384 U.S. 238), to change terms and conditions of employment. Is it "bad faith bargaining" if only some of the carriers exercise that right? Or is selectivity a sin only when practiced by unions?

2. The Decisions Under the National Labor Relations Act -- Which Permit Strikes Against Part of a Multi-Employer Unit, and Permit Unions to Seek Individual Agreements After Multi-Employer Bargaining Reaches Impasse -- Support the Validity of the Unions' Conduct.

We have shown above that, under the general principles of labor policy enunciated in the Railway Labor Act, unions are free to strike individual carriers despite national handling, and, once national handling fails, to seek agreements from individual carriers. Concededly, neither of these issues has been posed in any prior railroad case. However, there has been an abundance of litigation on these issues under the National Labor Relations Act.

In Railroad Trainmen v. Terminal Co., 394 U.S. 369, 383-384 (1969), the Supreme Court discussed the extent to which NLRA treatment may be deemed persuasive under the Railway Labor Act:

> "To the extent that there exists today any relevant corpus of 'national labor policy', it is the law developed during the more than 30 years of administering our most comprehensive national labor scheme, the National Labor Relations Act. This Act represents the only existing congressional expression as to the permissible bounds of economic combat...
>
> "It should be emphasized from the outset, however, that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes ... We refer to the NLRA's policies not in order to 'apply' them to petitioner's conduct -- for

> we conclude that this would be neither justified nor practicable -- but only to determine whether it is within the general penumbra of conduct held protected under the Act or whether it is beyond the pale of any activity thought permissible." (Emphasis added).

Ultimately, the course adopted by the Court was to treat all conduct permissible under the NLRA as equally permissible under the Railway Labor Act, but to leave greater room for additional conduct under the latter. "For although, in the absence of any other viable guidelines, we have resorted to the NLRA for assistance in mapping out very general boundaries of self-help under the Railway Labor Act, there is absolutely no warrant for incorporating into that Act the panoply of detailed law devloped by the National Labor Relations Board and courts under §8(b)(4)." Id., at 391.

As we will show, the unions' conduct here unquestionably is permissible under the NLRA. By analogy, it should be held equally permissible under the Railway Labor Act. Indeed, since the sole ground given by the court below for condemning the conduct was that it constituted "bad faith bargaining", the analogy can be drawn even more closely. "The negotiation required by the [Railway Labor] Act is the same 'good faith' bargaining required by the Labor Management Relations Act." Norfolk & P.B.L.R.Co. v. Brotherhood of Railroad Trainmen, 248 F. 2d 34, 45, fn. 6 (4th Cir. 1967).

The leading case under the NLRA is Morand Brothers Beverage Co., 91 NLRB 409 (1950), enforced 190 F. 2d 576 (7th Cir. 1951) and 204 F. 2d 529 (7th Cir., 1952), cert. denied 346 U.S. 909 (1953). In Morand, multi-employer negotiations wound up at impasse. The union then sent a contract, embodying the same terms it had sought in multi-employer negotiations, to each of the employers within the unit individually for signature. Thereafter, the union struck one of the employers, Old Rose, to compel it to sign. In response, the other employers fired their employees. The Board held that the unions' actions were entirely lawful, and that the firing of the employees therefore violated Sections 8(a)(1) and (3) of the Act.

In reaching its conclusion, the Board had to deal with a number of employer contentions that the unions' conduct was improper. First, it disposed of the employers' claim that the strike was unprotected because against only one employer within a multi-employer unit:

> "Respondent's position is ... that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none. If it strikes less than all, its members will be deprived of the protection of the Act; if it strikes all, they will be protected. We cannot give such an incongruous construction to an Act designed to minimize industrial strife." (91 NLRB at 413); emphasis added).

Next, the Board rejected the employers' claim that the strike, by seeking a separate contract from Old Rose, vio-

lated Section 8(b)(1)(B) of the Act.[22] The Board found no evidence that the Union was refusing to deal with the Association as Old Rose's bargaining representative (91 NLRB at 414). It then reasoned:

> "So far as the record shows, the Old Rose strike was called, not because of any objection by the Local to dealing with the negotiators for the Associations, but solely because of the inability of the Local to obtain a satisfactory contract through joint bargaining. Under these circumstances, wishing to bargain further during the strike on the basis of these demands, the Local had no alternative but to propose separate negotiations, and such negotiations were in fact proposed to Old Rose. Viewed in light of these facts, such proposal could not reasonably be construed by Old Rose as having any object other than to secure a satisfactory contract.
>
> "There is, accordingly, no basis in the record ... for finding that the strike was designed to restrain or coerce Old Rose in the selection of a representative for separate negotiations.
>
> * * *
>
> "... The action of the Local in seeking to bargain on a single-employer basis was not inconsistent with retention by the Respondents of their membership in their Associations nor, indeed, with the resumption of association-wide bargaining at an appropriate time. As we have already pointed out, the Local was not concerned with the Respondent's membership in the Associations; it was interested only in securing a satisfactory contract.
>
> * * *

22/ Section 8(b)(1)(B), 29 U.S.C. §158(b)(1)(B), which is closely analagous to Section 2 Third of the Railway Labor Act, provides:

> "It shall be an unfair labor practice for a labor organization or its agents --
>
> (1) to restrain or coerce ... (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

"Finally, the Respondents contend for a construction of Section 8(b)(1)(B) which would preclude a union from seeking to enter into separate negotiations, in lieu of joint negotiations, even after joint negotiations have collapsed. Such a view is inconsistent with the basic policy of the Act to encourage the practice and procedure of collective bargaining, as it would prevent the parties to a labor dispute from exhausting the possibilities of settling their dispute by collective bargaining rather than economic attrition. We do not believe, and are not prepared to hold, that Congress intended Section 8(b)(1)(B) to curtail collective bargaining in this fashion (Id., at 415-416; emphasis in original).

The Board then turned to the employers' claim that the union violated Section 8(b)(3) -- the good faith bargaining requirement -- by striking only one employer and by seeking an individual contract from that employer. Once again, the Board found no violation. It held that a union may take such actions once an impasse has been reached:

"We believe that under the statute the Local was ... required to bargain in the first instance with the negotiators for the Association until an impasse is reached."

* * *

"[W]ith respect to Section 8(b)(3), as with respect to Section 8(b)(1)(B), the Respondents and our dissenting colleague contend for a construction of the Act which would preclude 'residual' collective bargaining with individual employers, after negotiations with the common representative of such employers have failed. As already stated, we are unwilling to take a view of the Act which would frustrate its basic purpose of encouraging resort to collective bargaining rather than economic action, and which would have required the salesmen of all the Respondents to strike simultaneously ..." (Id. at 417, 419-420).

On review, the Seventh Circuit fully endorsed the

Board's holding that the unions' conduct was lawful. Morand Brothers Beverage Co. v. NLRB, 190 F. 2d 576 (7th Cir. 1951). It agreed that the union was free to send contracts to individual employers "after negotiations with the [Asssociation] had been stalemated" (190 F. 2d at 581), and also that "the union, unable to agree with the Associations upon a satisfactory contract, had a right to strike against Old Rose, or, for that matter, any or all of the Associations' members." (Id. at 582). The union "was free to call a strike against any or all of them" (Ibid).[23/]

Subsequent decisions uniformly have adhered to both parts of the Morand decision, i.e. that a union may strike part of a multi-employer unit, and that following impasse it may seek contracts on an individual employer basis.

Among the cases approving strikes against part of a multi-employer unit are Betts Cadillac-Olds, Inc., 96 NLRB 268 281 (1951) (The Union "was free to strike ... either against the entire Association or a segment of it."); Leonard v. NLRB, 205 F. 2d 355, 358 (9th Cir. 1953) (Union had the "right ... to call out the employees of one after another of the [Association

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23/ The Seventh Circuit remanded the case to the Board solely on the question whether the employers had locked out, rather than discharged, the employees. On remand, the Board adhered to its ruling that they had discharged the employees, 99 NLRB 1448 (1952), the Seventh Circuit thereupon enforced 204 F. 2d 529 (7th Cir. 1953), and the Supreme Court denied certiorari, 346 U.S. 909 (1953).

members] in the whipsawing manner above described"); Arizona District Council of Carpenters, 126 NLRB 1110, 1116 (1960) ("There is no authority to support the proposition ... that a strike against only some of the members of a multi-employer bargaining group is a violation of 8(b)(1)(B) and 8(b)(3), [and] the Act itself specifically permits the type of concerted activities engaged in by [the Unions]"); General Counsel Ruling No. SR-1194, 50 LRRM 1181 (1962) (no violation of 8(b)(3) where, after impasse, union struck some members of multi-employer unit: "There is no evidence to controvert the union's position that its selection stemmed solely from a desire on its part to exert the greatest economic pressure without putting all of its members on strike ...")

Similarly, the other part of the Morand holding -- the union's right to seek individual contracts following an impasse in multi-employer negotiations -- has been uniformly followed. In Cheney California Lumber Co. v. NLRB, 319 F. 2d 375 (9th Cir. 1963), the union negotiated with a multi-employer unit to impasse, then sought an individual contract from Cheney and struck Cheney to get it. The Ninth Circuit, affirming the Board, found that the union's conduct was not violative of Section 8(b)(3):

> "Cheney urges that ... the union's termination of negotiations with Pine [the multi-employer asso-

ciation] and resort to strike, under the circumstances of this case, amounted to a refusal to bargain in good faith.

"One issue, apparently regarded by all parties as controlling, was whether, at the time the unions broke off its negotiations with Pine, those negotiations had reached a state of impasse ... The Board concluded that they had.

* * *

"... What matters is whether the union had reasonable cause to believe that an impasse had been reached ...

"Under these circumstances it cannot be said that good-faith bargaining required the union to continue dealing with Pine ... [I]t was reasonable to believe that an agreement could only be reached through dealing directly and individually with the employers, and through resort to economic pressures in connection with such dealing." (319 F. 2d at 380; emphasis added).

Accord: International Hod Carriers, 150 NLRB 158, 162 n. 8, 179 (1964) (union "had no right to approach [a single employer] separately about contract terms so long as no impasse had occurred"); Local 964, United Bhd. of Carpenters, 181 NLRB No. 154 (1970), at TXD 14 ("As to the solicitation of such members to execute separate contracts after July 19 ... there was no impasse in fact on July 19 ... It is only when the parties have reached an impasse after exhausting the possibilities of good-faith bargaining that they are free to engage in unilateral action"); We Painters, Inc., 176 NLRB 140 (1969), at TXD 4 ("the union in its efforts to break the bargaining impasse by asking and obtaining individual contracts and striking, did not thereby yield its identity as a bargaining principal vis-a-vis

[the association], nor was [the association] dissolved by such action as a bargaining principal in the multi-employer unit").

We have shown above that, under the NLRA, unions are not guilty of "bad faith bargaining" when they strike part of a multi-employer unit, nor when they seek contracts from individual employers after negotiations reach impasse. The Supreme Court implicitly has placed its imprimatur on these principles by its decisions in the "defensive lockout" cases. NLRB v. Truck Drivers Union [Buffalo Linen], 353 U.S. 87 (1957); NLRB v. Brown, 380 U.S. 278 (1965). The issue in each of these cases was whether employers in multi-employer units violated Section 8(a)(3) by locking-out their employees in response to a whipsaw strike. Of course if the strikes had been unlawful the employers could not have violated the Act, for Section 8(a)(3) does not preclude even the more severe sanction of discharge for unlawful striking. Accordingly, had the Court thought the strikes illegal, it could have disposed of the cases easily on that ground. Instead, the Court clearly regarded the strikes as legal, and upheld the lockouts on other grounds.

Indeed, in Buffalo Linen, the Court made explicit its view that the strike was proper. There had been a 13 year history of multi-employer bargaining; the latest round of bargaining had reached an impasse; and the union struck one employer seeking a separate contract. The other employers locked out their employees. The Court, although stating that the strike "threatens the destruction of the employers' interest in bargaining on a group basis" (353 U.S. at 93), nevertheless considered the strike to be lawful, albeit further holding that the lockout was a lawful response:

> "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining ... The ultimate problem is the balancing of the conflicting legitimate interests...
>
> "... We hold that in the circumstances of this case the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful." (353 U.S. at 96, 97; emphasis added).

The Seventh Circuit, in its decision in Morand, supra, 190 F. 2d at 581, explained that the union's right to seek individual contracts following impasse is analogous to the employer's right to institute unilateral changes in terms and conditions

of employment following impasse. We believe that analogy to be sound, and likewise to be transferable to situations arising under the Railway Labor Act. That Act provides its own definition of the date upon which employers become entitled to make unilateral changes -- 30 days after issuance of the emergency board's report -- and, likewise, that should be the date upon which unions, having unsuccessfully sought agreement through national handling, should be free to seek contracts from individual carriers. Thus, under the Railway Labor Act, the courts need not become entangled in the thorny question -- necessary under the NLRA -- of determining when an "impasse" has occurred in fact. See, e.g. American Federation of Television Artists v. NLRB, 129 U.S. App. D.C. 399, 395 F. 2d 622 (1968). Of course, even if this Court were to look for an "impasse" in the NLRA sense, it would have to conclude that in this case an impasse had been reached. The Secretary of Labor himself, testifying before the Senate Labor Committee two days after the injunction below had issued, confirmed that the parties were hopelessly deadlocked (see p. 19, supra).

In light of the clear affirmation of the unions' conduct under the NLRA, it is ironic, indeed, that the court below purported to find "support" for its holding from the NLRA decisions. Only one case was cited as evidence of this support,

Int'l. Union of Operating Engineers, Local 825, 145 NLRB 952 (1964). In that case, a union sought from the outset of negotiations -- long before impasse had been reached -- to split up the multi-employer unit and revert to individual bargaining and, ultimately, it struck in support of that objective (145 NLRB at 958-959). The Board, consistent with its uniform position that unions may not prior to impasse seek individual agreements within a multi-employer unit, held that the union violated the Act. Manifestly, this case is inapposite, and provides no "support" for the decision below.

CONCLUSION

The unions' conduct was lawful self-help, and was not "bad faith bargaining" under the Railway Labor Act. Accordingly, the court below erred as a matter of law in issuing a preliminary injunction, and its decision should be reversed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,217

ALTON & SOUTHERN RAILWAY COMPANY, et al.,

Plaintiffs-Appellees,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.,

Defendants.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

Defendant-Appellant.

Appeal From a Preliminary Injunction
Issued by the United States District
Court for the District of Columbia

APPELLANTS' SUPPLEMENTAL MEMORANDUM AND AFFIDAVIT

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SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

Defendant-Appellant.

APPELLANTS' SUPPLEMENTAL MEMORANDUM AND AFFIDAVIT

This Supplemental Memorandum and Affidavit is filed to discuss developments in the law which have occurred subsequent to the filing of our reply brief, and to provide the Court with a current statement of the collective bargaining situation between the parties.

I. Mootness

Shortly after this appeal was filed, the carriers moved that it be dismissed as moot, because Congress had legislated a settlement of the negotiating dispute following the strike enjoined below. The Union opposed that motion on several grounds, among them the fact that the dispute had not actually

been settled -- but only temporarily interrupted -- by Congress' action; that the parties would be engaged in another round of negotiations in the near future and would confront the identical question as to their rights respecting selective strikes; and that the matter was one of considerable public importance.

This Court postponed ruling on the carriers' Motion to Dismiss until its consideration of the merits of the appeal. In order that the Court will have before it a current statement of facts when ruling upon the mootness issue, we have appended hereto an affidavit of the Union's chief negotiator describing the present status of negotiations between the Union and the carriers.

The parties presently are engaged in negotiations. One of the principal issues in the current negotiations is the Union's demand for abolition of the incidental work rule, the same issue as led to the selective strike enjoined in the instant case. If the parties do not reach agreement, the statutory procedures will likely be exhausted in the winter of 1971-72, and the Union will be entitled to resort to self-help.

If the Union determines that self-help is required, it contemplates resorting again to a selective strike -- a procedure which the Union believes spurred a successful conclusion of the recent negotiations between the carriers and the United Transportation Union following this Court's allowance of a selective strike in Delaware & Hudson Railway v. United Transportation Union,

-- U.S. App. D.C. --, -- F.2d --, 76 LRRM 2900 (March 31, 1971). The Union fears that the uncertainty of the law governing selective strikes may impair the chances of reaching a settlement in the current negotiations. As the parties' respective supplemental briefs make clear, they are still in disagreement as to the Union's rights following exhaustion of the statutory procedures. Since each party in every negotiation determines the basis upon which it will settle in light of the consequences which can be visited if settlement is not reached, disagreement as to what those consequences lawfully may be injects a variable into the negotiations which may preclude a settlement which otherwise might be reached.

The carriers argue (Supp. Bf. pp. 4-5) that this Court's decision in Delaware & Hudson is "dispositive of the principles governing the validity of selective strikes", and that accordingly there is no longer any public importance to deciding the instant case. We believe this represents too encompassing a reading of Delaware & Hudson. Unquestionably, Delaware & Hudson held that selective strikes in support of national agreements are lawful. But it did not purport to decide definitively the validity of selective strikes seeking individual contracts. None of the parties before the Court in Delaware & Hudson argued for the validity of such strikes, and thus the Court did not have a controversy before it on this issue. The Court was careful to distinguish the case before it from ours, and based upon that distinction was able to

uphold the validity of the UTU's strike while leaving open the possibility that selective strikes for individual contracts "may" be unlawful (76 LRRM at 2906). The point of the Court's analysis was that even if Judge Corcoran had ruled properly in Alton, that would not justify the injunction in Delaware & Hudson. The carriers surely reach too far in suggesting that this Court "disposed" of the Alton case in a proceeding where the Union was not present, and in which the Court emphasized that the issue was not posed.1/

Additionally, the carriers argue that Delaware & Hudson proves that this is not a situation involving a "short term order, capable of repetition, yet evading review", because there the UTU managed to obtain review (Supp. Bf. pp. 2-3). But the UTU had to make a substantial sacrifice to obtain review -- postponing its right to strike for nearly a month.2/

1/ The carriers also overreach in seeking to attribute to the Union's counsel a concession that Delaware & Hudson disposed of the instant case (Supp. Bf. p. 4, n. 2 and text thereat). We have never thought highly of the practice of quoting statements of opposing counsel in informal telephone conversations, and this instance confirms our view. In the conversation referred to, the carriers' attorney called the Union's attorney to invite withdrawal of the Union's appeal, because "you got everything you wanted" in the Delaware & Hudson decision. Union counsel responded that this was not so, because while that decision represented a "first bite" for railroad unions (the right to strike selectively for national contracts), the instant case afforded an opportunity to obtain a "second bite" (the right to strike for individual contracts as well). Union counsel does not believe his remards could honestly have been construed as indicating that the "second bite" was relitigation of a point actually decided in Delaware & Hudson. In any event, carriers' counsel will not have further opportunity to misconstrue Union counsel's oral statements; future communications between counsel for these parties will be in writing.

2/ The UTU's strike was scheduled to begin on March 8, 1971, but was enjoined until this Court's decision of March 31, 1971, and even then had to await a further notice period prescribed by this Court.

Moreover, while this Court granted expedited review in that case, there is no assurance that it will do so in future cases; and if it does not the postponement might be measured in years rather than months. Surely it is fairer that the parties learn their rights now than that the Union be required to surrender its right to strike for an extended period after the statutory procedures have again been exhausted while the parties bring the identical issue back to this Court. This need for prompt resolution is all the more important because the existing confusion about the Union's rights encumbers the negotiations themselves, and lessens the likelihood that the parties will reach a settlement without occasion for a strike.

While there was no mootness issue in Delaware & Hudson, there was an argument by the UTU that the case was controlled by principles of collateral estoppel. This Court swept aside that argument, stating:

> "We deem the public interest to warrant this Court's addressing itself to the proper substantive rule on the merits." 76 LRRM at 2906.

That "public interest" is likewise an important consideration dictating against a mootness finding here.

II. Scope of Review

In their original brief (pages 16-17), the carriers argued that, because this is an appeal from the issuance of a preliminary injunction, the sole issue is whether the District Court abused its discretion. We answered this argument in our

reply brief (pages 1-5), showing that where the propriety of a preliminary injunction turns upon whether the trial judge has applied an incorrect principle of law the matter is not one of "discretion" and the appellate court's scope of review is broader. That principle was reiterated in Delaware & Hudson;

> "Insofar as the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court ... If the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound. The reversal of the trial judge in no way reflects a determination that he was unreasonable or arbitrary, or chargeable with an abuse of discretion, but only and simply that his premise as to the applicable rule of law is deemed erroneous by the appellate court." 76 LRRM at 2913-14.

III. The Supreme Court's Recent Holding on Standards Governing Issuance of Strike Injunctions

On June 1, 1971, the Supreme Court issued its decision in Chicago and North Western Ry. Co. v. United Transportation Union, 39 LW 4641, resolving a conflict among the circuits as to whether strikes may be enjoined because of refusals to bargain.[3/] In a 5-4 decision the Court held that in limited circumstances violations of the bargaining duties established in Section 2, First could be remedied by issuance of strike injunctions. The four dissenters (Justices Brennan, Black, Douglas, and White) were of the view that the courts could do no more than order the parties to sit down and bargain,

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3/ This Court had held that they could, Brotherhood of Railroad Trainmen v. Akron B.B.R.Co., 128 U.S. App. D.C. 59, 385 F.2d 581 (1967), cert. denied 390 U.S. 923 (1968), but the Seventh Circuit had held otherwise in the decision reviewed by the Supreme Court.

and could not thereafter enjoin self-help because dissatisfied with the manner in which bargaining was conducted. 39 LW at 4649. While the majority abjured this total abstinence from strike injunctions, its decision called for extreme caution in exercising so dangerous a power. It warned against the issuance of injunctions except in situations where a party was found to be negotiating with a "desire not to reach an agreement":

> "/G/reat circumspection should be used in going beyond cases involving 'desire not to reach an agreement', for doing so risks infringement of the strong federal labor policy against governmental interference with the ... substantive terms of collective bargaining agreements." 39 LW at 4643, n. 11.

Reemphasizing this point later in its opinion, the Court stated:

> "Finally, the vagueness of the obligation under Section 2, First could provide a cover for free wheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place.
>
> "These weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of Section 2, First." 39 LW at 4645.

As we will show, the cautionary approach decreed in Chicago and North Western bears heavily upon the proper resolution of the issues in this case.

IV. The Legality of the Selective Strike

In Delaware & Hudson, this Court went to great lengths to distinguish Judge Corcoran's decision below from the case before it. It did so by making a number of assumptions:

1. That the evidence supported Judge Corcoran's finding that the incidental work rule was a subject for obligatory national handling[4/];

2. That decisions under the NLRA forbid selective strikes seeking individual agreements even after impasse;

3. That Judge Corcoran found the purpose of the selective strike here to be obtaining individual contracts; and

4. That the record supported such a finding as to the purpose of the strike.

We discuss each of these assumptions below.

1. This Court assumed in Delaware & Hudson that the record supported Judge Corcoran's finding that national handling of the incidental work rule dispute was obligatory. As we showed in our opening brief (page 16, n. 16) the record shows, to the contrary, that this is an issue as to which there has been neither uniformity nor national bargaining in the past, and,

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4/ The Court also reiterated its Atlantic Coast Line dictum that under the Railway Labor Act the parties are obligated to bargain on a national handling basis about certain subjects. We showed in our reply brief (pages 20-21) that this dictum does not correctly reflect the obligations imposed by the Railway Labor Act. We believe support for our position is furnished in the Supreme Court's decision in Chicago and North Western, supra, where the Court emphasized that the heart of the Section 2, First obligation is that each party have a desire to reach agreement, and that it not be unduly extended to furnish "cover for free wheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place."

consequently, that national handling is not obligatory under the standards enunciated by this Court in Atlantic Coast Line.

2. This Court assumed arguendo in Delaware & Hudson that the NLRA decisions do not permit strikes seeking individual contracts where bargaining has been on a multi-employer basis. That assumption is understandable, for Judge Corcoran had so declared, and none of the parties in Delaware & Hudson had reason to argue to the contrary. However, as the cases cited in our briefs (Opening Brief, pages 36-42; Reply Brief, pages 11 - 14) make clear, the NLRB decisions do permit strikes seeking individual contracts following an impasse in multi-employer bargaining.

Decisions issued under the NLRA since the filing of our reply brief further demonstrate that this is so. In Hi-Way Billboards, Inc., 191 NLRB No. 37, 77 LRRM 1461 (1971), two employer-members of a multi-employer association notified the union that "as /bargaining/ has reached an impasse" they were resigning from the association and wished to negotiate on an individual basis. Charged with violating their obligation to bargain in good faith by such withdrawal from multi-employer bargaining, the employers defended on the ground that following impasse the parties are entitled to revert to individual bargaining. The NLRB presumed the validity of that legal doctrine, but concluded that on the facts of the case before it no impasse had been reached (77 LRRM at 1462):

> "Respondents contend that an impasse in negotiation was reached on July 23 and, relying upon Tulsa Sheet Metal Works Inc., 149 NLRB 1487, enfd. 367 F.2d 55 (CA 10, 1966), assert that this impasse justified their resignation from the Association on July 25. We find, however, ... that there was no final impasse. On the contrary, at no time were the parties so far apart that there was no hope of reconciling differences as [respondents], in effect, acknowledged when they told [the union] that they thought the Association would accede to the union's demands after their withdrawal. Moreover, when [respondents withdrew from the Association] the disagreements they helped to create were promptly resolved and a contract was agreed upon shortly thereafter."

Similarly, in NLRB v. Johnson Sheet Metal, Inc., -- F.2d --, 77 LRRM 2245, 2248 (10th Cir. 1971), a decision from which the carriers mistakenly seek solace (Supp. Bf. p. 13, n. 6), the Court found that an employer's withdrawal from multi-employer bargaining was untimely because "whatever impasse may have existed had ended" before the withdrawal. And in Local 1205, Int'l. Bhd. of Teamsters, 191 NLRB No. 147, 77 LRRM 1880, 1881 (1971), the Trial Examiner, noting that the Union had dual motives for its strike -- " (1) the complete dissolution of the Association as bargaining representative ... and (2) the signing of individual contracts" -- declared that "the former motive I find clearly unlawful." The carriers cite this case and state (Supp. Bf. p. 13, n. 6) that "the trial examiner concluded that Morand does not represent 'the current thinking of the Board ...'" This is an outrageous misstatement of the Trial Examiner's decision. The Trial Examiner actually said something quite different. Noting the Teamsters' contention that Morand entitled a union to insist upon individual negotiations in which "the designated agent would be precluded from negotiations", the

Trial Examiner responded: "I am inclined to doubt, however, that the current thinking of the Board would now be in agreement with this construction of Morand." (77 LRRM at 1881, emphasis added). Thus, all the Trial Examiner was saying was that Morand cannot be construed to permit a union to force an employer to surrender an Association as its bargaining representative.

Finally, in a recent and very significant decision, the Board has gone beyond its prior decisions allowing unions to seek individual agreements after impasse and held that in some circumstances unions may sign individual contracts even prior to impasse. In Sangamo Construction Co., 188 NLRB No. 26, 77 LRRM 1039 (1971), the union struck all members of a multi-employer association, and one of the members -- "anxious to complete a certain highway project, the only work it was currently performing in the area" -- approached the union and entered into an "interim agreement" pending resolution of the multi-employer negotiations, enabling its employees to return to work. The Board held that neither the employer nor the union had violated the Act (77 LRRM at 1041):

> "/W/e ... conclude that the Respondents did not violate the Act by entering into or performing the terms of the interim agreement. The record does not convince us that such conduct had a significantly adverse impact upon the integrity of the multi-employer bargaining unit. Nor does the evidence show that the agreement was in derogation of the Association's bargaining authority or outside the coverage of the ultimate Association's contract. The facts show, rather, that bargaining did continue during the operative period and indeed resulted in an agreement which included Sangamo in its coverage."

Thus, in Sangamo, the Board recognized that some individual contracts sought and reached even prior to impasse[5/] may not violate the parties' obligation to bargain in good faith. For individual agreements may be consistent with, rather than in conflict with, the integrity of the multi-employer bargaining unit.

In sum, the NLRA decisions support two propositions: (1) following impasse in multi-employer bargaining a union may seek individual contracts, and (2) even prior to impasse a union may seek such individual contracts as do not threaten the integrity of the multi-employer bargaining unit.

This Court made an erroneous assumption about the NLRA cases in Delaware & Hudson, because it had nothing before it but Judge Corcoran's citation of a long NLRB decision. International Union of Operating Engineers, Local 825, 145 NLRB 952 (1964). In fact, as we have previously shown (Opening Brief, page 43; Reply Brief, page 13) that case was one in which the union, from the outset of negotiations, sought to shatter a multi-employer format, and the Board's decision was consistent with a long line of decisions holding that, prior to impasse a union may not seek to bargain individually with members of a multi-employer unit. Indeed, in light of Sangamo, even that doctrine is beginning to bend.

5/ There is no indication in the Board's opinion that the multi-employer negotiations had reached impasse.

3. This Court assumed that Judge Corcoran found the purpose of the selective strike here to be obtaining individual contracts. But as we showed in our Reply Brief (pages 7-9) Judge Corcoran did not make a finding as to the purpose of the strike, he declared all selective strikes to be unlawful, and he enjoined the Unions from conducting any selective strikes whatsoever, irrespective of their purpose.

4. Finally, this Court assumed that the evidence in the record of this case would support a finding that the purpose of the strike was to obtain individual contracts. This Court now has the Alton record and briefs before it, and we believe that on the basis of these materials it will recognize that, in light of the heavy burden which the carriers were obligated to sustain in order to justify a strike injunction, the record would not support a finding that the purpose of the strike was to obtain individual agreements.

The principal "evidence" upon which the carriers relied below for their contention that the strike was for individual contracts -- the asserted "inevitability" of that result following any selective strike -- was demolished in Delaware & Hudson as legally insufficient, 76 LRRM at 2907-2910. Denied that conjectural reed, the carriers are forced to rely exclusively on the following colloquy between the Court and Union counsel at the TRO hearing:

> "THE COURT: Excuse me. When you strike only one railroad out of 129 or 130, you call that a whip saw strike?

"MR. HICKEY: Yes.

"THE COURT: What is the purpose of that?

"MR. HICKEY: The purpose of it, Your Honor, is to try to reach an agreement now that all of the procedures of the Railway Labor Act have been exhausted, through efforts to reach one on a national basis, to go back to the starting point and reach it if possible on a single carrier basis.

"Now I don't think that there is any question about the fact that that is the effort that is being made."

This colloquy does not warrant the conclusions which the carriers seek to draw from it.

First, there is nothing to suggest that the unions no longer desired to reach a national agreement. On the contrary, the gist of the colloquy is that the unions did want a national agreement, and that it was only their inability to obtain one which was forcing them to search for solutions to their bargaining dilemma. In light of the Supreme Court's caution against issuance of strike injunctions in situations "going beyond ... 'desire not to reach an agreement'" (supra), this alone is sufficient to demonstrate the incorrectness of the issuance of the injunction.

Second, there is nothing in the colloquy to suggest that the unions were seeking to break up the carriers' solidarity, or to escape from dealing with the carriers' chosen representatives. On the contrary, the record unmistakably shows that the unions were fully prepared to continue dealing with the carriers' chosen representatives (see our Reply Brief, pages 6-7).

Third, the carriers' construction of the colloquy as indicating that the unions would seek individual agreements is at best argumentative. All that union counsel said was that the unions would try to reach "it ... on a single carrier basis." Viewing the colloquy as a whole, "it" appears to refer to the national agreement, and the statement may have meant no more than that the unions would pursue their national agreement by striking "on a single carrier basis".

Fourth, even if the colloquy were construed to indicate that, frustrated in their efforts to obtain a national agreement, the unions were contemplating an effort to obtain individual agreements as the only remaining resort, it would still be plain that any such individual agreements would be precisely the agreement being sought nationally (i.e., the unions hoped to reach "it" on a single carrier basis).

Fifth, neither the district court nor the carriers' counsel probed further to determine more specifically what the unions contemplated. Thus, even if counsel's statement be construed as indicating a union preparedness to seek some sort of individual contract, the record is wholly devoid of evidence as to what kind of contract that would be. It might, for example, have been the sort of "interim" contract which the NLRB held permissible in Sangamo, supra, even prior to an impasse in multi-employer bargaining.

In our view, of course, this whole problem is irrelevant, for we believe that, following exhaustion of the statu-

tory procedures, unions may seek individual agreements. But if this Court were to hold to the contrary, the question would remain: Which party bears the burden of the obvious paucity of record evidence relating to the unions' purpose. While there is some language in Delaware & Hudson which might be construed as indicating that the unions have the burden of proving that their strike is for a lawful purpose (76 LRRM at 2910-2912, 2915), the Supreme Court's subsequent decision in Chicago and North Western makes clear that, to the contrary, the burden is on the party who would have a strike enjoined to prove a violation of Section 2, First. Thus, it was the carriers' burden to prove that the strike in the instant case was for an unlawful purpose. We believe they wholly failed in that effort. They did not prove that the unions no longer had a desire to reach a national agreement. They did not prove that the unions had a desire to force individual agreements. And they did not prove that the unions had a desire to reach the kind of individual agreement which might be interdicted by the NLRB even prior to impasse. In sum, irrespective of the holding which this Court reaches on the right to seek individual agreements, this case must fall for lack of proof. And a holding to that effect will be one of great importance in the development of the law under the Railway Labor Act. For, in light of Chicago and North Western, it is essential that the district courts be instructed that strikes are not to be enjoined without clear and convincing evidence of a violation of Section 2, First.

CONCLUSION

This case poses two important questions relating to the Railway Labor Act which were not decided in Delaware & Hudson:

(1) Whether, and to what extent, unions may seek individual agreements following exhaustion of the statutory procedures on a national handling basis; and

(2) Whether, on a barren record devoid of persuasive evidence as to a union's purpose, Norris-LaGuardia (and Chicago and North Western) permit the issuance of a strike injunction.

We believe the Court should resolve these questions by holding that:

(1) Unions may seek individual agreements without restriction following exhaustion of the statutory procedures;

(2) At the very least unions may seek certain types of individual agreements following exhaustion of the statutory procedures, and the injunction here -- issued without inquiry into the Unions' purpose -- must fall; and

(3) In any event, since there is no evidence that the Unions had abandoned their willingness to enter into a national agreement, the injunction was improper even if unions may not seek any types of individual agreements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 1971, I served three copies of the foregoing Appellants' Supplemental Memorandum and Affidavit on Appellees by mailing a copy of same by first class, postage prepaid mail, to their attorney of record in this case addressed as follows.

Francis Shea, Esq.
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Washington, D. C. 20005

_____
Michael Gottesman

Affidavit of J. W. O'Brien

J. W. O'Brien being duly sworn, deposes and says:

1. I am General Vice-President of Sheet Metal Workers International Association (hereinafter the Union), and have the primary responsibility for the conduct of collective bargaining negotiations on behalf of the Union's members employed in the railway industry.

2. On November 18, 1970, the Union addressed Section 6 notices to each of the carriers employing its members. Among the demands made by the Union on each carrier was the following:

> "I. Incidental Work Rule: Abrogate attachment No. 1 (generally referred to as the incidental work rule) as contained in the Memorandum of Understanding of December 4, 1969 and imposed upon the Sheet Metal Workers International Association by Public Law 91-226, dated April 9, 1970."

3. Beginning in about early December 1970 the carriers began to serve counter proposals upon the Union. These counter proposals were identical from carrier to carrier. Among the carrier proposals was one which would broaden the carriers' authority to assign work across traditional craft lines far beyond that granted by the Incidental Work Rule. Specifically, the carriers' proposal called for the establishment of a new job entitled "General Mechanic". The carrier would be accorded the "unrestricted right" to assign general mechanics to perform any or all of the work traditionally performed by the respective crafts.

4. On Decmeber 24, 1970, J. P. Hiltz, Jr., Chairman of the National Railway Labor Conference, wrote to me and re-

quested that bargaining with the carriers be conducted on a national basis. On January 8, 1971, I responded that the Union preferred to conduct negotiations on an individual carrier basis, but that the Union was prepared to bargain with whatever representative the individual carrier would designate for that purpose. The Union's reason for resisting national handling was its fear that, should negotiations be conducted on a national basis, it might lose the right to engage in selective strikes. Negotiations were stalled for several months because the parties could not agree on a bargaining format: The Union preferring to negotiate on an individual carrier basis, and the carriers insisting on negotiating on a national basis. This logjam was finally broken on April 30, 1971, when I wrote to Mr. Hiltz as follows:

> "While Sheet Metal Workers International Association does not feel that national handling is required by law, nevertheless, in an effort to expedite the handling of this matter, it hereby notifies the National Railway Labor Conference of its willingness, on a voluntary basis, to proceed into national handling with respect to its proposals and the counter proposals served by the various carriers..."

The Union agreed to this course for two reasons. First, it was the only way to get negotiations going. Second, this Court's decision in the Delaware & Hudson case provided some assurance that if the Union entered into national handling it would not lose altogether its right to engage in selective strikes.

5. Thereafter, the parties engaged in bargaining on a national handling basis, the last such meeting taking

place on June 29, 1971. The parties were unable to reach an agreement. One of the major obstacles to agreement was the incidental work rule.

6. On July 7, 1971, the Union referred the dispute to the National Mediation Board. The Board has now advised the parties that it will begin mediation sessions as soon as it has manpower available for that purpose. It is anticipated that mediation sessions will begin in early October 1971. Based upon the Union's prior experience, the mediation period usually consumes only a few weeks, following which, if the parties have not reached an agreement, the National Mediation Board relinquishes its jurisdiction over the dispute. Thirty days thereafter, the Union would be entitled to strike. Thus, it is likely that, if the parties are unable to resolve their dispute in mediation, the Union's right to strike will attach sometime in the winter of 1971-72.

J. W. O'Brien

J. W. O'Brien

Sworn to and subscribed before me this 9th day of September, 1971.

Mary I. Klein

Notary Public

BRIEF FOR APPELLEES

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 24,257

ALTON & SOUTHERN RAILWAY COMPANY, ET AL.,

Appellees,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, ET AL.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,

Appellant.

On Appeal from an Order of the United States District Court
for the District of Columbia

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United States Court of Appeals
for the District of Columbia

FILED OCT 11 1970

Nathan J. Paulson
Clerk

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In the
UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 24,217

ALTON & SOUTHERN RAILWAY COMPANY, ET AL.,

Appellees,

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INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,

Appellant.

On Appeal from an Order of the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

The labor dispute underlying the litigation that gave rise to this appeal has been disposed of, the whipsaw or selective strikes over that labor dispute which were preliminarily enjoined by the order on appeal are no longer possible, and that order has expired by its own terms. Consequently, appellees believe that the controversy, including this appeal, is moot and that the appeal should be dismissed and the case remanded with directions to the District Court to vacate the preliminary injunction order and to dismiss the complaint, without prejudice, as moot. Appellees' Motion to Dismiss Appeal as Moot, therefore, was filed with this Court on May 20, 1970. On September 30, 1970, the Court entered an order in which consideration and decision of that motion

was "referred to the division of this Court assigned to decide this case on the merits" and the time for filing Appellees' brief on the merit was "extended for a period of 30 days from the date of this order."

In compliance with that order, we demonstrate in this brief that the Court should affirm the decision below if it reaches the merits of that decision. We continue to urge, however, that the appeal should be dismissed as moot without reaching the merits of the decision below for the reasons stated in Appellees' Motion to Dismiss Appeal as Moot and in Appellees' Reply to Appellant's Opposition to Motion to Dismiss Appeal as Moot, filed on June 29, 1970.

QUESTIONS PRESENTED*

1. Whether this appeal from an order preliminarily enjoining whipsaw or selective strikes over a labor dispute is moot since that dispute no longer exists, such strikes are no longer possible, and the preliminary injunction has expired by its own terms?

2. If the appeal is not dismissed as moot and the Court reaches the merits of the decision below, whether the District Court abused its discretion in preliminarily enjoining whipsaw or selective strikes against one or a few of the members of a multi-employer bargaining unit, pending a final hearing upon the validity of such strikes, in a situation where bargaining on a multi-employer basis had been agreed to by the parties to the dispute and was obligatory under the Railway Labor Act and such strikes threatened to force the struck carriers to bargain and agree separately with the striking unions so as to destroy the multi-carrier bargaining unit and interfere with the carriers' choice of their bargaining representatives?

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* This case has not previously been before the Court.

STATEMENT OF THE CASE

This litigation arose out of a labor dispute between Appellees (hereinafter referred to as the "carriers"), who comprise most of the nation's Class I railroads, and four of the unions representing their shopcraft employees (hereinafter collectively referred to as the "shopcraft unions"), including Appellant (hereinafter referred to as the "Sheet Metal Workers union"). The dispute commenced on November 8, 1968 when the shopcraft unions served the carriers with identical written notices (A 51-54), pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156), proposing changes in national agreements (as modified by the award of the Special Board pursuant to P.L. 90-54) concerning the wages paid by the carriers to employees represented by those unions. On November 29, 1968, the carriers served the shopcraft unions with identical Section 6 notices (A 55-58) of counterproposals requesting various national rule changes. A 4, 16, 332-333, 352.

Multi-employer or multi-carrier bargaining, commonly referred to in the railroad industry as "national handling," has been established in the industry for many years. Insofar as the shopcraft unions are concerned, multi-carrier bargaining goes back at least to World War I and has occurred whenever substantially identical Section 6 proposals have been served by or upon the carriers generally. There has been a long series of national wage agreements, stretching back to 1932, and various rules and other matters also have been the subject of national agreements arrived at in multi-carrier bargaining between the carriers and the shopcraft unions. A 3, 23-24, 26-27, 342, 352.

Multi-carrier bargaining not only has long been commended and encouraged by the National Mediation Board as conducive to labor peace in the industry (A 27-28), but also has frequently been recognized by union representatives as a necessary means for disposing of national labor disputes. The shopcraft unions contended as long ago as 1921 that they had a "right to negotiate uniform conditions of employment on all roads," and that "an agreement applying to all railroads will be a great, if not the greatest, factor in assisting to establish efficient and economical railroad operation" (A 28). Counsel for the shopcraft unions and numerous others argued in 1952 that "national handling has become firmly established as a part of the necessary procedure for the handling of national movements," and "has uniformly been recognized by both sides as essential if collective bargaining of a uniform national proposal is to function, else the bargaining process cannot hope to dispose of such an issue in anything like an orderly fashion," so that a "refusal to bargain concertedly in such a situation thus amounts simply to a refusal to have the only type of collective bargaining that can effectively dispose of the issues. . . ." (A 28-29).

The reasons why national handling of wages and other common problems has been long established and generally recognized as essential in the railroad industry are not hard to discover. Labor costs amount to approximately 50% of railroad operating expenses, and thus are a very significant factor in the ability of the carriers to compete with each other as well as with other modes of transportation. Individual handling of such issues as wages would tend to force each side to adopt extreme positions, and thus inhibit peaceful settlement

of such disputes, as the particular carrier would be fearful that otherwise it might agree to more than its competitors would agree to and the union negotiator on that carrier would be fearful that more would be obtained by union negotiators on other carriers causing intense dissatisfaction among the employees he represents. A 25. As union officials have testified, "there is nothing that upsets the railroad man more than to find that somebody else gets more money for doing the same character of work that he is doing," so that wages "nearly have to be the same on all railroads" or "you would have chaos every time you had a lodge meeting" (A 25-26). In addition, the sheer mechanical problems involved in handling the same basic dispute separately as to each of some 150 railroads through the procedures of the Railway Labor Act would greatly delay settlement of the dispute as to all the carriers (A 25). Consequently, the Chairman of the Railway Labor Executives Association (which then included the shopcraft unions and almost all of the other railroad unions) testified before Congress in 1967 that he did not consider individual handling of industry-wide disputes to be "practical" as "[y]ou would have to have 200 or 300 separate negotiations in the railroad industry in each movement" and "I don't believe it would work out" (A 29-30). On balance, therefore, as he also testified (A 30), "insofar as national negotiations are concerned, as they have worked out in the past, it has been advantageous to both of us. I think it has helped us materially; it has helped the carriers materially. It has prevented, in my opinion, a great deal of chaos." See, also, A 342-343.

In addition to this general recognition that labor problems common to the carriers generally should be handled and disposed of in national multi-carrier bargaining, the shopcraft unions (as well as the carriers) specifically

recognized the appropriateness of such multi-carrier bargaining in handling the dispute that gave rise to this litigation. In their Section 6 notices served on November 8, 1968, those unions expressly "propose[d] that the matter be handled on a joint national basis" if not settled in the initial conferences with the individual carriers, stated that the "organizations serving this identical Notice on the various carrier managements have created an Employes' Conference Committee composed of the International Officers or their representatives of the organizations serving this identical Notice," and requested "that you join with other carrier managements who are receiving the identical Notices, in the creation of a Carriers' National Conference Committee, to negotiate in accordance with the procedures of the Railway Labor Act, as amended, the subject matter of this Notice" (A 17, 51-52). See A 332-333, 343.

The carriers authorized the National Railway Labor Conference and the three regional carriers' conference committees to represent them in negotiating for a settlement of the dispute, and such multi-carrier negotiations commenced on March 17, 1969. Throughout the further progress of the dispute, summarized below, the parties continued to bargain on a multi-carrier basis. This included the mediation by the National Mediation Board ("NMB"), the proceedings before Emergency Board No. 176, and the negotiations after that board made its report in which the parties were assisted from time-to-time by the NMB and officials of the Department of Labor. See A 4-5, 16-18, 22, 342, 252. Thus, those governmental bodies or officials, as well as the parties, recognized the appropriateness of handling the dispute on a multi-carrier basis.

Mediation commenced on June 18, 1969 but failed to resolve the dispute and on September 3, 1969, after the shopcraft unions rejected (although the

carriers had accepted) a request by the NMB that the parties submit the dispute to voluntary arbitration, the NMB terminated its services. Section 5 First of the Railway Labor Act (45 U.S.C. § 155 First) required the parties to maintain the status quo for 30 days after the NMB terminated its services; i.e., until 12:01 A.M. on October 4, 1969. The shopcraft unions announced that they would strike 7 of the 140 carriers involved in the dispute when that 30-day period expired, and the carriers announced that if such whipsaw strikes were not prevented the non-struck carriers would institute a lockout and shutdown their operations for the duration of such strikes. On October 3, 1969, however, the President created Emergency Board No. 176 to investigate and report upon the dispute pursuant to Section 10 of the Railway Labor Act (45 U.S.C. § 160). Since Section 10 required the parties to continue to maintain the status quo until the emergency board made its report and for 30 days thereafter, the threatened whipsaw strikes and lockouts did not occur at the time. A 4-5, 17-19, 143-144, 334, 352.

In its November 2, 1969 report (A 59-97), Emergency Board No. 176 made recommendations for a national agreement settling the dispute which were accepted by the carriers but rejected by the unions. Further national negotiations ensued and continued past the expiration of the 30-day period following that report in which the parties were required by Section 10 to maintain the status quo until December 4, 1969 when the representatives of the parties initialed a Memorandum of Understanding (A 131-138) setting forth terms acceptable to those representatives for settling the dispute. In addition to general wage increases for 1969 recommended by the emergency board and a further substantial general

wage increase for 1970 (to which the recommendations of the emergency board did not extend), those terms included rule modifications--one of which was the so-called incidental work rule--and moratorium provisions sought by the carriers and special wage adjustments for the employees worked out in general accordance with the recommendation by the emergency board (A 88) that those matters be further negotiated. A 20-21, 334-335.

The shopcraft unions insisted, however, that the Memorandum of Understanding be ratified by the employees represented by each such union. The Sheet Metal Workers union insisted that the Memorandum of Agreement be submitted to the employees it represented for approval even though that union (unlike the Machinists) did not have any requirement in its constitution or by-laws for such ratification. A 5, 21, 35-36, 144-145, 205-206, 335, 352. The employees represented by the three largest unions voted to approve the Memorandum of Understanding, but it was rejected by the employees represented by the Sheet Metal Workers union (A 5, 21, 335, 352)--reportedly by a vote of 2,203 to 1,267 out of a total of some 6000 eligible employees. See S. Rept. No. 91-758, 91st Cong., 2d Sess., at 3.

The carriers and shopcraft unions resumed their negotiations in January of 1970 but no further agreement was reached and on January 31, 1970 the shopcraft unions commenced a whipsaw strike of one of the 140 carriers involved in the dispute--the Union Pacific Railroad Company. A 21, 48-50, 187, 192-196, 201, 335. The other carriers involved in the dispute announced that they would lockout if the whipsaw strike continued for the duration of such strike (A 32-35, 49-50, 145, 335), and both sides commenced litigation in the court below. The shopcraft

unions sued the carriers to enjoin lockouts (Civil Action No. 298-70), the carriers sued the shopcraft unions to enjoin whipsaw strikes (this case, Civil Action No. 299-70), and certain unions not involved in the dispute also sued the carriers to enjoin lockouts (Civil Action No. 358-70). Both strikes and lockouts were temporarily restrained, in an order (A 139-141) issued on January 31, 1970 by Judge Sirica, through (as subsequently extended by consent (A 190-191, 322)) March 2, 1970, pending a hearing and decision on motions for preliminary injunction.[1/]

That hearing was held on February 20, 1970 and related to both the whipsaw strikes and lockout issues (A 236-321) upon the basis of the pleadings (A 3-9, 351-353), the record on the hearing on the temporary restraining order (A 146-183), affidavits filed by the carriers (A 14-50, 192-209, 326-329) and exhibits attached thereto (A 51-138, 210-235), and affidavits filed by the unions (A 142-145b, 184-187, 323-325).[2/] The evidence thus before the District Court not only established the facts summarized above (none of which we understand to be disputed), but also established that a purpose and effect of whipsaw strikes by the shopcraft unions--unless prevented or countered by an effective lockout--was to coerce the struck carriers into bargaining and agreeing on an individual basis through local officials rather than on a multi-carrier basis

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1/ The opinion by Judge Sirica explaining his grant of the temporary restraining order (A 181-183) is reported at 310 F. Supp. 904.

2/ The carriers' affidavits and exhibits thereto also were filed in the lockout cases, and the shopcraft unions' affidavits also were filed in the lockout case which they brought, so that those affidavits generally relate to both the whipsaw and the lockout issues. The carriers contended that the strike violated the Railway Labor Act for two reasons in addition to its whipsaw or selective nature--the invalidity of the ratification procedure insisted upon by the unions and the failure of the shopcraft unions to bargain in good faith about one of the issues involved in the dispute--and the pleadings and affidavits relate also to those contentions (which were not reached by the District Court). Finally, we note that various papers filed only in one or both of the lockout cases and relating only to that issue also were before the District Court.

through the national representatives designated to represent them in the dispute, and thus that such strikes threatened to destroy the established multi-carrier bargaining unit as well as interferring with the selection by the struck carriers of their bargaining representatives.

In reducing the Affidavit of John P. Hiltz, Jr. to letter size for inclusion in the Appendix (A 14-50), Appellant omitted paragraph 16 (see A 30), as follows:

> "16. Destruction of the established multi-carrier bargaining unit and negotiation of individual agreements, rather than a national agreement negotiated nationally, almost inevitably will be the result of the whipsaw strikes threatened by the Shopcraft Unions, referred to in paragraph 7 above, unless such whipsaw tactics are enjoined by the courts or the non-struck carriers lock out their employees. It is very difficult, if not impossible, for a single carrier or for a few carriers to stand out alone against the full power of national unions so as to resist capitulation for any considerable period of time when competing railroads as well as other modes of transportation continue to operate. That is demonstrated by the results in the crew consist dispute between most of the nation's railroads and the Brotherhood of Railroad Trainmen, following the decision in Brotherhood of R.R. Trainmen v. Atlantic C. L. R.R., 383 F.2d 225 (D.C. Cir. 1967). After it was held in that case that the crew-consist dispute should be handled locally rather than nationally, because of the local nature of the crew-consist dispute and the past history of local rather than national crew-consist agreements, the Brotherhood of Railroad Trainmen--through whipsaw strikes and the threat of such strikes--picked the carriers off one-by-one or a few at a time until today almost all have been forced to agree, in individual carrier negotiations, to restore the great bulk of the crew positions found to be unnecessary under guidelines set by a special arbitration panel established to determine the issue by Public Law 88-108."

As Mr. Hiltz also pointed out (A 33-34): "Much rail traffic is repetitive in nature. If an established user of a carrier's services is forced by a strike of that carrier to arrange for other methods of transportation, there is a possibility that he may not resume his business with the struck carrier once the strike is ended. The long-term effects of the interruption of established

traffic patterns for even a few days is so serious that the pressure upon the whipsawed carriers to reach the best individual settlement that they can as quickly as possible will be almost irresistible, if competing carriers continue to operate normally." See, also, A 201-204. This evidence by the Chairman of the National Railway Labor Conference was confirmed and amplified by the Vice President for Labor Relations (Mr. Glen L. Farr) of the Union Pacific--the carrier first struck by the shopcraft unions--at A 195-196.

Indeed, when the shopcraft unions had earlier announced (prior to the creation of Emergency Board No. 176) that they intended to strike seven of the carriers (see p. 7, supra), they sent letters to the presidents of those seven railroads requesting them to make new designations of representatives to negotiate individual settlements between those railroads and the unions (A 30-31).[3/] And in the hearing on the motion for temporary restraining order, the following colloquy occurred between the Court and counsel for the shopcraft unions (A 155; see A 202):

> "THE COURT: Excuse me. When you strike only one railroad out of 129 or 130, you call that a whip saw strike?
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> "MR. HICKEY: Yes.
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> "THE COURT: What is the purpose of that?
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> "MR. HICKEY: The purpose of it, Your Honor, is to try to reach an agreement now that all of the procedures of the Railway Labor Act have been exhausted, through efforts to reach one on a national basis, to go back to the starting point and reach it if possible on a single carrier basis.
>
> "Now I don't think that there is any question about the fact that that is the effort that is being made."

3/ The shopcraft unions (Br., at 12) note that a similar letter was not sent to the Union Pacific and bargaining continued on a national basis after that carrier was struck. But the unions did not give the Union Pacific any advance notice of the strike (A 49-50, 193), unlike what was done when the unions threatened to strike the seven carriers, and the strike was restrained the day it commenced, so that there was very little opportunity for such a communication to the Union Pacific. And, of course, the further national negotiations occurred while the unions were restrained from engaging in their whipsaw tactics.

Mr. Hickey went on to state that the shopcraft unions preferred not to call a national strike because "Congress would have to intervene" (A 156), and the General Vice President for the Machinists (William W. Winpisinger) stated in an affidavit that only one carrier was struck "because it has now become clear beyond dispute that a nationwide strike of all railroads will not be permitted by the United States Government. . . ." (A 185-186). But neither Mr. Winpisinger nor anyone else disavowed the candid acknowledgement by Mr. Hickey that "the effort that is being made" to achieve that purported ultimate objective was "to go back to the starting point and reach it [agreement] if possible on a single carrier basis." And, the shopcraft unions did not offer any evidence contradicting the carriers' evidence that the foreseeable effect of whipsaw or selective strikes (if not prevented or countered by an effective lockout) is to force the struck carriers to bargain and agree on an individual basis, through their individual officers rather than through the carriers' national representatives, and thus destroy the multi-carrier bargaining unit and interfere with the carriers' choice of their bargaining representatives. 4/

In an opinion by Judge Corcoran (A 330-348) reported at 310 F. Supp. 905, the District Court summarized the history of the dispute (A 332-336), the contentions of the parties (A 336-340), and the standards governing disposition of motions for preliminary injunction (A 340), and concluded with "those standards in mind" that "the shopcraft unions' whipsaw strike against the Union Pacific violates the Railway Labor Act and that such violation is subject to an injunction

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4/ Mr. Winpisinger also asserted (A 186) that "the carrier struck on January 31, 1970, is free to designate anyone it chooses to bargain on its behalf," but the National Railway Labor Conference and conference carrier committees represent the carriers in national, multi-carrier labor disputes (A 15-16, 23) and, as Mr. Farr asserted without contradiction (A 195), "A strike and picketing of the Union Pacific alone in the western territory would place intolerable pressure upon the Union Pacific to withdraw from the established multi-carrier bargaining unit, to disavow its [national] bargaining representatives in the dispute. . . . , and to attempt to negotiate an individual agreement for the Union Pacific alone through myself or other labor relations officers of the Union Pacific."

issuing from this Court" (A 341). In support of that holding, the District Court found (A 343) that "both the 'practical appropriateness' of mass bargaining and historical experience in handling the issue in the past make continued national handling [of the underlying labor dispute] obligatory" under the Railway Labor Act as construed by this Court in Brotherhood of Railroad Train. v. Atlantic Coast Line R. Co., 127 U.S. App. D.C. 298, 383 F.2d 225 (1967). "National handling being obligatory, . . . any action taken to defeat continued national handling violates the provisions of the Railway Labor Act" (A 343), including the provisions in Section 2 First (45 U.S.C. § 152 First) and Section 2 Second (45 U.S.C. § 152 Second) of that Act (A 343-344).[5/] Judge Corcoran also noted that his decision "finds support in decisions" which "hold that a union violates the National Railway Labor Act when it begins bargaining on a multi-employer level and then attempts to force individual agreements by whipsaw striking individual members of the multi-employer unit" (A 345).

In view of this holding, the District Court did not pass upon two additional grounds urged by the carriers in support of their motion for a preliminary injunction (A 347-348; see fn. 2, p. 9, supra). The Court also

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5/ There was no need for the Court to consider Section 2 Third of the Act in view of its conclusions that whipsaw strikes violate other sections of the Act, and thus there is no basis for the speculation by the Sheet Metal Workers union (Br., at 17-18) that "Judge Corcoran apparently rejected the carriers' claim that the purpose of the strike was to force Union Pacific to renounce NRLC as its bargaining agent and/or to force it out of the 'multi-employer unit'" in failing to discuss Section 2 Third. Indeed, in concluding that whipsaw strikes would be contrary to the parties' duty under Section 2 First "to continue to deal on a national level even after the procedures of the Railway Labor Act have been exhausted" (A 344) and contrary also to his interpretation of Section 2 Second "to mean that once negotiations have begun on an obligatory national basis the negotiations must continue until the dispute is settled on that basis" (A 344), Judge Corcoran obviously recognized that a purpose and effect of such strikes is to coerce individual-carrier rather than multi-carrier negotiations and agreements, through the particular carrier's local officers rather than its national bargaining representatives, and thus that such strikes threaten to destroy the multi-carrier bargaining unit and interfere with the carriers' choice of their bargaining representative.

concluded (A 347) that "the prayers [by the unions in Civil Actions No. 298-70 and 358-70] for an injunction against a lockout are mooted" since "the threat of a lockout is professedly and admittedly a defensive, retaliatory measure which will not materialize once the whipsaw strike is thwarted. . . ." While the Court thus did not directly pass upon the validity of the threatened lockout, it did so indirectly in rejecting a contention by the shopcraft unions that the alleged invalidity of the threatened lockout prevented the Court from enjoining whipsaw strikes, under the "clean hands" doctrine of Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108), even if such strikes violated the Railway Labor Act. Judge Corcoran held in that regard that "the threat of a lockout, in the circumstances of this case, [does not] constitute a violation of the Railway Labor Act" (A 347). Since that holding has not been attacked on this appeal, it will not be further discussed herein.

Pursuant to the findings and conclusions made in Judge Corcoran's opinion, the District Court on March 2, 1970 entered an order (A 349-350) "preliminarily enjoining" the shopcraft unions "from authorizing, calling, encouraging, permitting, or engaging in any whipsaw strike or work stoppage or picketing against the Union Pacific Railroad or any other selected carrier over any dispute arising from the Section 6 notices served on or about November 8 and November 29, 1968." The Sheet Metal Workers union noted an appeal from that order on April 1, 1970 (A 354), but the other three shopcraft unions did not appeal and no one appealed from the orders entered on March 1, 1970 in Civil Actions No. 298-70 and 358-70 denying the unions' motions for a preliminary injunction against a lockout. 6/

6/ Civil Actions No. 298-70 and 358-70 have since been dismissed without prejudice pursuant to stipulations by counsel for the respective parties, in view of the mootness of the controversy.

In the meantime, the shopcraft unions threatened a national strike of all the carriers which was temporarily prevented by P.L. 91-203 (84 Stat. 22) extending the period in which the parties to the labor dispute were required to maintain the status quo, by Section 10 of the Railway Labor Act, until "12:01 a.m. of April 11, 1970." On April 9, 1970, the President signed P.L. 91-226 (84 Stat. 118) providing that "the memorandum of understanding dated December 4, 1969, shall have the same effect (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act . . . ." As urged in Appellees' Motion to Dismiss Appeal as Moot, by thus disposing of the underlying labor dispute the Congress mooted the litigation growing out of that dispute including this appeal. We note that in enacting P.L. 91-226, the Congress rejected an amendment proposed by Representative Eckhardt that would have had the effect of permitting strikes of and agreements by individual railroads, while prohibiting a national strike. Congressional Record, April 8, 1970, H 2748-2751.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix hereto.

ARGUMENT

As already stated at pp. 1-2, supra, our argument in this brief that the District Court properly granted the preliminary injunction order on appeal is not intended to constitute a retreat from our primary position that this controversy is moot and the appeal accordingly should be dismissed for the reasons set forth in Appellees' Motion to Dismiss Appeal as Moot and related papers. We discuss the merits of the preliminary injunction only because the Court has directed that that issue be heard together with the mootness issue.

If this Court should reach the merits of whether or not the District Court should have issued a preliminary injunction, it should be recognized that that issue is not the same as the ultimate issue of whether or not a whipsaw strike violates the Railway Labor Act under the circumstances of this case. As this Court held in A Quaker Action Group v. Hickel, ___ U.S. App. D.C. ___, 421 F.2d 1111, 1116 (1969), and as Judge Corcoran recognized (A 340), a trial court should grant a preliminary injunction if the movant shows "a substantial likelihood of success on the merits, and that irreparable harm would flow from the denial of an injunction," giving consideration to "the inconvenience that an injunction would cause the opposing party" and "the public interest as well." Hence, the "decision to grant a preliminary injunction normally lies in the discretion of the trial judge," the "scope of review" by this Court on appeal "is accordingly limited" to "whether the trial judge abused his discretion in granting the injunction, or rested his analysis upon an erroneous premise;" this Court's task "is not to resolve the merits" of the fundamental legal or factual issues raised by the case. 421 F.2d, at 1115.[7/]

The arguments by the Sheet Metal Workers union (Br., at 22-43) are cast in terms of the ultimate issue of whether or not whipsaw strikes violate the Railway Labor Act. In terms of the standards governing the issuance of a preliminary injunction by the District Court, therefore, those arguments go only to the question of whether the carriers demonstrated "a substantial likelihood of success on the merits" after a full trial. And in terms of the standards governing review by this Court, the Sheet Metal Workers union must persuade the

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7/ In addition to its many earlier decisions to the same effect cited by this Court in A Quaker Action Group, see also this Court's subsequent decision in Dalmo Sales Co. v. Tysor's Corner Reg. Shopping Center, ___ U.S. App. D.C. ___, 429 F.2d 206, 209 (1970).

Court that there is no reasonable basis for a conclusion by the District Court that the carriers did demonstrate "a substantial likelihood of success on the merits" so that the District Court abused its discretion in issuing the preliminary injunction despite the irreparable injury to the carriers and to the public that otherwise would result. We set forth below our reasons for believing that whipsaw strikes would violate the Railway Labor Act in the circumstances shown by the record before the District Court. But even if the Court should be more doubtful about that than we are, those arguments surely are not so unreasonable as to permit this Court to conclude that the District Court abused its discretion in issuing the preliminary injunction.

A. The Railway Labor Act.

When this litigation commenced, the carriers and the shopcraft unions had exhausted the procedures required by the Railway Labor Act in regard to so-called "major" disputes over Section 6 proposals for changes in existing agreements concerning rates of pay, rules, or working conditions. The parties are required by the Act to preserve the status quo until an agreement is reached or those procedures (conferences, mediation by the NMB and, in the discretion of the President, an investigation and report by an emergency board) are exhausted. But if the procedures prescribed by the Act are exhausted without an agreement being reached and the Act otherwise is complied with, the parties to the dispute may then resort to self-help such as strikes by the unions and lockouts by the carriers. See, e.g., Shore Line v. Transportation Union, 396 U.S. 142, 148-153 (1969); Railroad Trainmen v. Terminal Co., 394 U.S. 369, 378-380 (1969); International Ass'n of Mach. & A. Wkrs. v. National Med. Bd., ___ U.S. App. D.C. ___, 425 F.2d 527, 533-534 (1970).

On the other hand, the fact that the parties to a labor dispute under the Railway Labor Act may be free to engage in self-help does not mean that they are free to do anything they please. The mere fact that the parties have gone through the forms prescribed by the major dispute procedures of the Act does not mean that they can ignore other requirements of the Act. Long Island Rail Road Co. v. Brotherhood of Rail. Train., 185 F. Supp. 356, 358 (E.D. N.Y., 1969). For example, a carrier cannot completely disregard its collective bargaining agreements with other unions or non-disputed provisions of its agreements with the disputing union, simply because it has exhausted the procedures of the Act in a dispute over a proposal to change a particular provision of its agreements with the disputing union. Railway Clerks v. Florida E.C.R. Co., 384 U.S. 238 (1966). We need not belabor this point, however, as the Sheet Metal Workers union does not now contest the point and appears to agree (Br., at 27) that whipsaw strikes would be illegal if they conflicted with some obligation imposed by the Railway Labor Act even though the procedures required by the Act have been exhausted.

The ultimate legal issue in the case, therefore, as Judge Corcoran stated ('A 341) "is whether, after national handling of a dispute has failed to produce an agreement, a strike against an individual carrier who has been part of the multi-employer bargaining unit is legal." His conclusion that such a strike would be illegal is firmly grounded in the language of the Railway Labor Act as construed by this Court in Brotherhood of Railroad Train. v. Atlantic Coast Line R. Co., 127 U.S. App. D.C. 298, 383 F.2d 225 (1967) (hereinafter referred to as the "Atlantic Coast Line" case).

Section 2 First of the Act (45 U.S.C. § 152 First) provides that it "shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." Plainly, this duty, which has been described by the Supreme Court as the "heart of the Railway Labor Act,"[8/] does not terminate when the procedures of the Act are exhausted. The statute does not in terms impose any such limitation and one could hardly have been intended. If anything, good faith efforts to make an agreement settling the dispute are more necessary after the procedures of the Act are exhausted than before. The only alternative would be for strikes to continue until either the carriers of the union have been destroyed.

In continuing to make "every reasonable effort" to settle a major dispute, therefore, the union must continue to bargain with the representatives of the carriers involved in the dispute. Section 1 Sixth of the Act (45 U.S.C. § 151 Sixth) defines "representative" to mean "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them" (emphasis added). Section 2 Second (45 U.S.C. § 152 Second) provides that "all disputes between a carrier or carriers and its or their employees shall be considered, and, if possible decided, with all expedition, in conference between representatives designated. . . by the carrier or carriers and by the employees thereof interested in the dispute" (emphasis added). And, Section 2 Third (45 U.S.C. § 152 Third) provides that

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8/ Railroad Trainmen v. Terminal Co., supra at 377-378.

representatives "shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. . . ."

This statutory scheme clearly contemplates that a "group of carriers" may designate a joint representative, such as the National Railway Labor Conference and the carriers' conference committees, to bargain and agree on behalf of all the "carriers . . . interested in the dispute," and expressly prohibits the unions from taking any action that will "in any way interfere with, influence, or coerce" the carriers in that regard. These provisions of the Railway Labor Act, like Section 2 First, are not limited in time and make no distinction between the period prior to the exhaustion of the procedures of the Act and the period after such exhaustion. 9/ A strike of one or a few of the carriers in the multi-carrier bargaining unit necessarily will tend to coerce such carriers to withdraw from the unit and reach the best individual settlement that they can, and thus destroy the right of the carriers interested in the dispute to bargain and agree as a group through joint national representatives. See pp. 9-12, supra.

In short, the statutory language supports the proposition that the carriers have a continuing right to bargain and agree as a group through joint national representatives, and that the unions are prohibited from in any way interfering with, influencing or coercing the carriers in the exercise of that right, whether by whipsaw strikes or otherwise.

9/ In Ruby v. American Airlines, Inc., 329 F.2d 11 (2d Cir., 1964), for example, the court held that American violated Sections 2 First, 2 Second and 2 Third, inter alia, by refusing to bargain with the designated representatives of its flight engineers and by interfering with their choice of a representative, during a period commencing some six months after the parties had exhausted the procedures of the Act in regard to wage demands by the flight engineers.

In the Atlantic Coast Line case, the Brotherhood of Railroad Trainmen refused to participate at all in multi-carrier bargaining over Section 6 notices served on or by some 80 railroads proposing to change the rules governing the consist of train crews following the expiration of the Award by Arbitration Board No. 282. Consequently, the disputes were mediated separately by the NMB and it terminated its services with respect to three of the railroads while the others remained in mediation. When the union threatened to strike the three railroads, they sued to enjoin the strikes because of the union's refusal to bargain on a multi-carrier basis. It was recognized by both sides that the ultimate issue was whether the union could whipsaw the 80 railroads involved in the dispute. Thus, the District Court found, among other things, that:

> "The evidence shows that Mr. Luna's purpose in avoiding negotiations on a national basis in this instance and preferring to deal with each railroad separately, was to escape from being eventually relegated to a position where he would have a choice of calling either a nationwide strike, or no strike at all. He realistically realized as a result of his experience in 1963 that Congress would not tolerate such a national emergency, but thought that Congress would not interfere with separate strikes on individual railroads at different times. His plan was to isolate each railroad and call separate strikes, one at a time, in order to achieve his ultimate objective, step by step.
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> * * *
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> "It is clear that each of the two rival commanders-in-chief, Mr. Wolfe for the carriers and Mr. Luna for the union, in a far-sighted manner planned a series of strategic moves. Each organized a united front. One desired to use his forces to face his adversary as a unit. The other planned to pursue the policy of divide and conquer. He did not want to confront his opponent's united front. At this point the law and the public interest step in."

Atlantic Coast Line R. Co. v. Brotherhood of Rail. Train., 262 F. Supp. 177, 186-187 (D. D.C., 1967).

The District Court agreed with the contention of the three railroads that multi-carrier national handling is obligatory (unless the parties agree otherwise) whenever substantially identical Section 6 proposals are served by or upon a multiple number of carriers, rejecting the contention by the union that national handling always is dependent upon the consent of both sides, and enjoined the threatened strikes. Id., at 186-190. On appeal, the union again urged that if multi-carrier national handling was had or was held to be obligatory the "only lawful course of action would be for the Brotherhood to strike every railroad in the country. . . ." [10] That such would be a consequence of national handling also was emphasized by the Government which stated, among other things, that "[i]f its ruling stands, the district court has forced bargaining over the crew consist issue into a national mold--so that unless agreement is reached on that issue, the public may be confronted with another national railroad strike." [11] The railroads involved in that case agreed that national handling would invalidate whipsaw strikes of less than all of the carriers involved in the dispute, and defended that position. [12]

With full knowledge of the understanding by the lower court, the parties and the Government that a consequence of holding that national handling is obligatory is that strikes of individual carriers would be invalid, this Court "reject[ed] the position of both parties" on the underlying issue as to when, if ever, national handling is required by the Railway Labor Act, and adopted "a more individuated approach, akin to that suggested in the brief of the United

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10/ Brief for Appellant, at 55.

11/ Brief for the United States as Amicus Curiae, at 2.

12/ Brief for Appellees, at 27-36, 56-57.

States appearing as amicus curiae urging reversal. . . ." 383 F.2d, at 228. Under that approach, multi-carrier national handling "is certainly lawful," but "[w]hether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point [giving rise to the labor dispute] and of the historical experience in handling any similar national movements." 383 F.2d, at 229.

Applying that "more individuated approach" in the Atlantic Coast Line case, this Court pointed out that "there has never been a national crew consist rule," which "distinguishes the crew consist issue markedly, for example, from the national rule contained in the National Diesel Agreements concerning the use of firemen," and that such a national crew-consist rule had been "deemed 'wholly unrealistic' by objective boards officially deputized to study the underlying problem and formulate appropriate dispositions." 383 F.2d, at 229. Hence, this Court concluded that multi-carrier bargaining was not obligatory in regard to the crew-consist issue and reversed the decision below.[13/]

Unlike the union involved in the Atlantic Coast Line case that refused to participate in national handling of the crew-consist dispute, the shopcraft unions not only agreed to, but also expressly requested, national handling of the dispute that gave rise to this litigation. See p. 6, supra. Such an agreement to bargain on a multi-carrier basis is "lawful," even in circumstances where it is not "obligatory," under the Railway Labor Act as construed by this Court in Atlantic Coast Line. Moreover, the dispute that gave rise to this litigation involved issues that have been the subject of multi-carrier bargaining

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13/ Following that decision, the union through strikes and threats to strike one or a few of the carriers at a time gradually coerced them into making individual agreements whereby virtually all of the positions found to be unnecessary under Award 282 were restored. See p. 10, supra.

and agreement for some 40 years, and the governmental agencies involved--the NMB, Emergency Board No. 176 and the Department of Labor--as well as the parties have dealt with the dispute on a multi-carrier basis. See pp. 3-6, supra. The conclusion by the District Court (A 343), applying the criteria established by this Court in Atlantic Coast Line, that "both the 'practical appropriateness' of mass bargaining and 'historical experience' in handling the issue in the past make continued national handling obligatory" in regard to this dispute appears to us to be unquestionable in view of these circumstances. Indeed, the Sheet Metal Workers union purports (Br., at 22 and fn. 18 thereto) in introducing its argument to accept the view that national handling of the instant dispute was obligatory under Atlantic Coast Line, but then proceeds in effect to argue the contrary without again mentioning the Atlantic Coast Line decision.

We have pointed out that everyone concerned in the Atlantic Coast Line case recognized that the prevention of whipsaw or selective strikes would be a consequence of a holding that multi-carrier national handling is obligatory. The conclusion that this is in fact a consequence of obligatory national handling not only was drawn by Judge Corcoran in the decision on appeal, but also was drawn by Judge Aubrey Robinson in an earlier case involving the shopcraft unions. Chicago, Burlington & Quincy R.R. v. Railway Emp. Dept., 301 F. Supp. 603 (D. D.C., 1969). In that case, the shopcraft unions had served only the Burlington with a Section 6 notice proposing to amend a 1964 national agreement relating to the "contracting out" of work. After exhausting the procedures of the Railway Labor Act in regard to that Section 6 notice, the unions threatened to strike the Burlington if their demands were not granted. In issuing a preliminary injunction against the threatened strike, Judge Robinson concluded (id., at 607) that:

> "The subject matter of the parties' current dispute is one that has been handled, historically, on a multi-employer basis by the carriers' designated national representative and the unions. . . . Having recognized the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees as the national representative of the carriers, the unions are not now free to compel the Burlington Railroad to bargain with them on a unilateral basis and thus break up the established multi-employer bargaining unit. When such a pattern of national bargaining has been established and the issues are not unique to the unions' dealing with any specific carrier, then both 'the practical appropriateness of mass bargaining on that point' and the 'historical experience' in handling the issue in the past make national of the matter obligatory. Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co., supra."

We do not know of any decisions to the contrary and none has been cited by the Sheet Metal Workers union.

As we understand the argument made in the Brief for Appellant, the basic contention of the union is that its obligation to bargain on a multi-carrier basis ceased when the multi-carrier negotiations reached an impasse, so that it could then withdraw from the multi-employer bargaining unit and force the carriers to bargain and agree on an individual-carrier basis through the coercion of whipsaw strikes. Apart from the legal deficiencies in that contention, it also suffers from the fatal defects that it was not made below, that the record is devoid of any evidence that multi-carrier negotiations were at an impasse when the whipsaw strike of the Union Pacific was instituted, and the evidence of record does show that multi-carrier negotiations were resumed after the whipsaw strike was restrained so that the parties to the dispute rather clearly did not regard those negotiations as being at an impasse.

An impasse in bargaining does not exist merely because the parties have not yet reached an agreement. Otherwise negotiations always would be at an impasse until agreement is reached, and the concept would have no meaning. Rather, as the concept has developed under the National Labor Relations Act--which appears to be

the sense in which it is used by the Sheet Metal Workers union--an impasse does not exist until it becomes clear that "further bargaining on an issue is futile. . . ." Dallas General Drivers, W. & H. Local No. 745 v. N.L.R.B., 122 U.S. App. D.C. 417, 355 F.2d 842, 844 (1966).[14] Thus, an impasse does not necessarily exist merely because one side has rejected the proposals of the other, N.L.R.B. v. United Nuclear Corporation, 381 F.2d 972, 977 (10th Cir., 1967), or even has terminated the negotiations and refused requests that they be resumed, Carpinteria Lemon Ass'n v. National Labor Rel. Bd., 240 F.2d 554, 557-558 (9th Cir., 1956).

In the lower court, the shopcraft unions contended that their obligation to bargain on a multi-carrier basis ceased when the procedures required by the Railway Labor Act were exhausted, rather than when an impasse in those negotiations was reached. See A 245-249, 302-307, 318. Hence, their affidavits (A 142-145b, 184-187) detailed the exhaustion of the procedures required by the Act but did not refer to the status of the negotiations when the Union Pacific was struck other than to note that an agreement had not been reached after the Sheet Metal Workers union failed to ratify the Memorandum of Understanding. Of course, exhaustion of the procedures required by the Railway Labor Act is not the same thing as an impasse in negotiations. In the dispute that gave rise to this litigation, the procedures of the Act were exhausted at 12:01 A.M. on December 3, 1969, yet the parties continued their negotiations and reached the

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14/ The Court also pointed out that there are "no fixed definitions of an impasse or deadlock which can be applied mechanically to all factual situations which arise is the field of industrial bargaining," and no "rigid formula for assessing so subtle an issue as the precise time when an impasse occurs. . . ." 355 F.2d, at 845.

Memorandum of Understanding on December 4, 1969. After that Memorandum of Understanding was not ratified by the Sheet Metal Workers union, multi-carrier negotiations resumed and, as the record demonstrates (A 323-329) further such negotiations occurred after whipsaw strikes were restrained by the District Court. See pp. 7-8, supra. We do not see how Judge Corcoran can be said to have abused his discretion in issuing the preliminary injunction because he did not accept a contention that was not made to him and that was not supported by evidence of record, and we submit that this Court could not properly reverse that preliminary injunction even if the contention were otherwise sound.

In any event, that contention would not be sound even if based upon a proper record. The facts demonstrating the "practical appropriateness of mass bargaining on that point" and the "historical experience in handling any similar national movements" (A 342-343; see pp. 3-6, supra), so as to make multi-carrier national handling "obligatory" under the Act as construed in Atlantic Coast Line, do not cease to exist once an impasse is reached. Sections 1 Sixth and 2 Second of the Act do not make an exception for the situation after an impasse in authorizing a group of carriers to designate a common representative to confer on their behalf about common problems with representatives of their employees, and the prohibition in Section 2 Third against interference by the unions in the carriers' selection of their representatives does not terminate when an impasse is reached.

In Dallas General Drivers, W. & H., Local No. 745 v. N.L.R.B., supra, 355 F.2d, at 844, this Court observed, with respect to review of determination by the NLRB as to whether an impasse in bargaining had or had not been reached, that:

> "The problem of deciding when further bargaining on an issue is futile often is difficult for the bargainers and is necessarily so for the Board. But in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems."

See, also, p. 26, supra and fn. 14 thereto. And see, e.g., Oil, Chemical and Atomic Wkrs. Int. U., Local 3-89 v. N.L.R.B., 132 U.S. App. D.C. 43, 405 F.2d 1111, 1118 (1968); American Fed. of Television & Radio Artists v. N.L.R.B., 129 U.S. App. D.C. 399, 395 F.2d 622, 627 (1968). See, generally, Epstein, Impasse in Collective Bargaining, 44 Tex. L.R. 769 (1966).

The above quotations indicate some of the practical problems of introducing the impasse concept into a determination of whether multi-carrier bargaining is required by the Railway Labor Act. It is "often difficult for the bargainers" to determine whether an impasse has been reached, so that the parties to a dispute could not be certain whether multi-carrier or single-carrier bargaining was required. If litigation resulted, under the Railway Labor Act the determination would not be by an expert "board which deals constantly with such problems," but by courts lacking such experience. Moreover, an "impasse in bargaining is a temporary state of affairs; when the situation changes the duty to bargain is revived." Epstein, supra at 770. See, e.g., N.L.R.B. v. Webb Furniture Corporation, 366 F.2d 314, 315-316 (4th Cir., 1966).[15] Finally and perhaps most importantly, a holding that an impasse in multi-carrier bargaining terminates

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15/ One change in circumstances that generally has been held to break an impasse and revive the duty to bargain is a strike. National Labor Rel. Bd. v. United States Cold Stor. Corp., 203 F.2d 924, 928-929 (5th Cir., 1953); National Labor Relations Board v. Jones Furniture Mfg. Co., 200 F.2d 774, 775 (8th Cir., 1953); Jeffrey-DeWitt Insulation Co. v. National L.R. Board, 91 F.2d 134, 139 (4th Cir., 1937). This fact illustrates the nonsensical nature of a principle that would permit whipsaw strikes while an impasse exists.

the obligation to bargain on a multi-carrier basis would encourage a union desirous of destroying multi-carrier bargaining to bring about an impasse rather than "to exert every reasonable effort" to make an agreement, and thus would be inconsistent with Section 2 First of the Act.

The arguments on pages 22-31 of the Brief for Appellant, which purportedly demonstrate that the Railway Labor Act and decisions thereunder support the impasse contention, consists of a farrago of unrelated and sometimes inconsistent propositions--each one of which could as well be made to support a contention that whipsaw strikes are permissible prior to an impasse and thus does not demonstrate why an impasse should make a difference in that regard. While the Sheet Metal Workers union commences its argument (Br., at 22, fn. 18) with a purported acceptance of the obligatory nature of multi-carrier bargaining in regard to the dispute that gave rise to this litigation under the Act as construed in Atlantic Coast Line, that case thereafter is ignored and in effect contradicted.

The brunt of the Sheet Metal Workers union's argument appears to be that the decision below deprived the union of any right to strike and thus is contrary to the purposes of the Railway Labor Act (Br., at 22-27).[16] When analyzed, however, it is apparent that that argument is based upon the action of the Congress in enacting P.L. 91-226 and similar ad hoc legislation disposing of national rail disputes where necessary to prevent nationwide rail strikes, rather

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16/ The union has intermixed in this argument quotation from cases to the effect that self-help is permitted and strikes cannot be enjoined after the procedures required by the Act have been exhausted. But the union now concedes (Br., at 26-27)--in contrast to its position below--that the Act may limit the extent or nature of the self-help that is permissible at that point. We have demonstrated (pp. 19-20, supra) that the provisions of the Act which create an obligation to bargain on a multi-carrier basis in certain circumstances continue to apply after the procedures of the Act are exhausted, and those circumstances obviously do not cease to exist at that point just as they do not cease to exist when an impasse is reached (see p. 27, supra).

than upon the Railway Labor Act as interpreted by the court below or by this Court in Atlantic Coast Line. See Br., at 22-23. Thus, the argument would be more appropriate if addressed to the Congress rather than to this Court.[17] The basic point of Labor Board v. Insurance Agents, 361 U.S. 477 (1960) (see Br., at 30), insofar as at all pertinent here, is that administrative agencies and courts should not deviate from legislation enacted by the Congress because of their own views as to the kinds of self-help that should be permitted.

The union does not contend that the Congress could not validly enact P.L. 91-226 or other legislation disposing of a major dispute not settled pursuant to the procedures of the Railway Labor Act, thereby preventing strikes or lockouts in connection with the dispute, and could hardly so contend in the face of decisions such as Wilson v. New, 243 U.S. 332 (1917), and Brotherhood of Loc. Fire. & Eng. v. Chicago, B. & Q. R. Co., 225 F. Supp. 11 (D. D.C., 1964), aff'd per curiam, 118 U.S. App. D. C 100, 331 F.2d 1020 (1964). Insofar as the policies of the Railway Labor Act are concerned, its primary policy is to prevent strikes rather than to put the unions in a position to strike as the Sheet Metal Workers union appears to believe. Section 2 states in part that the "purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. § 151a), and the Supreme Court has recognized that "the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" Shore Line v. Transportation Union, supra at 148, fn. 13; Texas & N.O. R. Co. v. Ry. Clerks, 281 U.S. 548, 565 (1930).

17/ Indeed, representatives of the Sheet Metal Workers union, in testimony before congressional committees, contended at great length that the Congress should not enact P.L. 91-226 and thus deprive the union of the right to strike. The Congress not only rejected that argument, but also rejected a proposed amendment that would have permitted strikes of individual railroads. See p. 15, supra.

This Court has concurred in that understanding of the Act. International Ass'n of Mach. & A. Wkrs. v. National Med. Bd., supra, 425 F.2d, at 533. Hence, in enacting P.L. 91-226, the Congress complemented the major purpose of the Railway Labor Act.[18/]

The union's argument (Br., at 27-30) that destruction of an established multi-carrier bargaining unit through whipsaw strikes is not inconsistent with the duty to bargain in good faith cannot possibly be squared with its concession that the instant dispute is one as to which multi-carrier bargaining is obligatory under the Act as construed in Atlantic Coast Line. This Court posited its approach in that case upon "[w]hat constitutes good faith bargaining in the railroad industry. . . ."[19/] The union's argument also disregards Sections 1

18/ The Sheet Metal Workers union suggests at one point (Br., at 25-26) that the carriers will not bargain in good faith if they know that the courts will prohibit whipsaw strikes under the Railway Labor Act and that the Congress will enact ad hoc legislation preventing national strikes. In addition to its irrelevancy, that argument is without basis in the record or in reason. No one can predict in advance with any certainty what the Congress will do in some future situation, and the results of such ad hoc legislation, even if enacted, can be highly dissatisfactory to the carriers as, for example, the award of the Morse Board pursuant to P.L. 90-54, 81 Stat. 122. See pp. 8-9 of the Affidavit of John P. Hiltz, Jr., filed with this Court on June 29, 1970. Moreover, the duty imposed by Section 2 First of the Railway Labor Act to "exert every reasonable effort" to make an agreement settling a labor dispute is enforceable against the carriers as well as against the unions. E.g., Virginian Ry. v. Federation, 300 U.S. 515, 549-553 (1937); Brotherhood, Etc. v. Atlantic Coast Line R. Co., 201 F.2d 36 (4th Cir., 1953). And, in the instant dispute the carriers did bargain in good faith and agreed to the Memorandum of Understanding with the shopcraft unions even though this Court's Atlantic Coast Line decision and the Burlington decision by the lower court (see pp. 21-25, supra) gave them every reason to believe that whipsaw strikes would be enjoined and a national strike by the shopcraft unions in a prior dispute had been prevented by P.L. 90-54.

19/ "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." 383 F.2d, at 229. Destruction of multi-employer bargaining through whipsaw strikes also has been held to constitute "bad faith" bargaining under the National Labor Relations Act. See pp. 39-42, infra.

Sixth and 2 Second of the Act, which authorize a group of carriers to designate a common representative to represent them in a common dispute, and Section 2 Third which prohibits the unions from interfering in any way with the carriers' choice of their bargaining representatives. See pp. 19-20 , supra. And, that argument ignores the fact that permitting whipsaw strikes after an impasse would place a premium on conduct causing an impasse, and thus would encourage a failure to bargain in good faith. See pp. 28-29, supra.

Finally, the Sheet Metal Workers union urges (Br., at 30) that there is "[n]o evidence" to support the position of the carriers and of the lower court (see fn. 5, p. 13, supra) that whipsaw strikes tend to force individual bargaining and agreement by the struck carriers so as to destroy the multi-carrier bargaining unit. But as we have shown (pp. 9-12, supra), that fact not only was established by the evidence but also was admitted by counsel for the shopcraft unions below, who stated that "the effort that is being made" by the whipsaw strikes is "to go back to the starting point and reach it [agreement] if possible on a single carrier basis." See p. 11, supra. The Supreme Court has recognized, as the evidence here shows (see pp. 10-11, supra), that the effect of unimpeded whipsaw strikes is to destroy the multi-employer bargaining group by forcing individual settlements. See Labor Board v. Brown, 380 U.S. 278 (1965), and Labor Board v. Truck Drivers Union, 353 U.S. 87 (1957). See, also, pp. 35-38, infra. And, the general rule "that a man is held to intend the foreseeable consequence of his conduct" is applicable in labor cases. Radio Officers v. Labor Board, 347 U.S. 17, 45 (1954). See, e.g., Labor Board v. Erie Resistor Corp., 373 U.S. 221, 227-228 (1963); Teamsters Local v. Labor Board, 365 U.S. 667, 675 (1961).

We submit, therefore, that the decision below is supported by the language of the Railway Labor Act and by this Court's interpretation of that Act in Atlantic Coast Line, and that there is no basis whatever for the union's position that whipsaw strikes should be permissible after an impasse in multi-employer bargaining--either in the Act, in the decisions under the Act, in reason or in the record of this case.

B. The National Labor Relations Act.

While basing his decision upon the Railway Labor Act as interpreted by this Court in Atlantic Coast Line, Judge Corcoran noted (A 345) that his decision also "finds support in decisions under the National Labor Relations Act" which hold that "a union violates" that Act "when it begins bargaining on a multi-employer level and then attempts to force individual agreements by whipsaw striking individual members of the multi-employer unit." The Sheet Metal Workers union disagrees (Br., at 32-43) with Judge Corcoran's understanding of the decisions under the NLRA, and urges that the decisions under that Act establishes that whipsaw strikes are permissible if there is an impasse in multi-employer bargaining even though not permissible prior to such impasse.

We shall demonstrate that the union's understanding of the law under the NLRA is erroneous, but even if it were otherwise that obviously would not be a ground for refusing to apply the Railway Labor Act and prior decisions under that Act in a case arising under the Railway Labor Act. Where the "text and legislative history of the Railway Labor Act, and the decisional law thereunder, provide little guidance," the courts have "referred to the NLRA for assistance in construing the Railway Labor Act. . . ." Railroad Trainmen v. Terminal Co.,

394 U.S. 369, 382, 383 (1969). But even in such a situation, which does not exist here, the Supreme Court has "emphasized . . . that the National Labor Relations Act cannot be imported wholesale into the railway labor arena" and that "[e]ven rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." 20/ Id., at 383.

The union says (Br., at 34) that the "leading case under the NLRA" is Morand Brothers Beverage Co., et al., 91 NLRB 409 (1950), remanded, 190 F.2d 576 (7th Cir., 1951), subsequent decision, 99 NLRB 1448 (1951), enforced, 204 F.2d 529 (7th Cir., 1953). In fact, it would be difficult to find a decision under the NLRA that has been more thoroughly discredited.

20/ In addition to the fact that the Railway Labor Act does not provide for an administrative agency equivalent to the National Labor Relations Board to administer the Act, while the NLRA--unlike the Railway Labor Act--does not require mediation when the parties are unable to agree, there are other differences between the two statutes that are particularly pertinent for present purposes. The Railway Labor Act does not contain an equivalent of 29 U.S.C. § 163 which provides that nothing in the NLRA, "except as specifically provided for" in that Act, "shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Unlike the situation in regard to violations of the Railway Labor Act, the courts normally do not have jurisdiction of suits by employers (or unions) to enjoin violation of the NLRA. Bakery Drivers Union v. Wagshall, 333 U.S. 437, 442 (1948); Meekins, Inc. v. Boire, 320 F.2d 445, 448-449 (5th Cir., 1963); Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183 (4th Cir., 1948). An apparent consequence of this fact and the further fact that unfair labor practice complaints normally are not decided by the NLRB until many months after the alleged violation occurred, is that employers subject to the NLRA often resort to lockouts to protect multi-employer units from being destroyed by whipsaw strikes while a lockout apparently has never occurred under the Railway Labor Act. (In the decision below, Judge Corcoran concluded that the threat of a lockout to protect multi-carrier bargaining from being destroyed by whipsaw strikes does not violate the Railway Labor Act.) Perhaps most importantly for present purposes, the NLRA does not contain a provision similar to Section 1 Sixth of the Railway Labor Act which expressly authorizes a "group of carriers" to designate a common representative to bargain on their behalf, and multi-employer bargaining is dependent upon agreement thereto by both sides (although the right to withdraw unilaterally after agreement is limited). N.L.R.B. v. Dover Tavern Owners' Association, 412 F.2d 725, 727 (3d Cir., 1969); News Union of Baltimore v. N.L.R.B., 129 U.S. App. D.C. 272, 393 F.2d 673, 679 (1968); Publishers Association of New York City v. N.L.R.B., 364 F.2d 293, 295 (2d Cir., 1966). In the Atlantic Coast Line case, this Court rejected contentions by the union that the right to multi-carrier bargaining under the Railway Labor Act also is dependent upon agreement by both sides thereto and that unilateral withdrawals therefrom should be permitted (383 F.2d, at 228-229), concluding that multi-carrier bargaining is "obligatory" in some circumstances (including circumstances such as those involved here) (383 F.2d, at 229).

The charge in the Morand case was that the members of a multi-employer bargaining unit had violated the NLRA in locking out their employees after one member of that unit was struck by the union. The validity of the strike itself was not directly in issue, but the employers contended, among other things, that the invalidity of the strike justified their lockout. See 91 NLRB, at 413. The NLRB held that a lockout as a defense to a whipsaw strike violated the Act, and stated that the strike did not violate the Act (in the absence of interference with the employers' choice of their bargaining representative) as an impasse had been reached in the multi-employer bargaining and, in the Board's view, the union should be permitted to withdraw from such bargaining and bargain with the individual employers after such an impasse. In reaching those conclusions, the Board appears to have been influenced primarily by the belief that permitting such lockouts or prohibiting such whipsaw strikes would spread the work stoppages to all the employers involved in a multi-employer dispute and by the view that permitting a union to withdraw from multi-employer bargaining after an impasse "would reduce . . . the existing disparity between the treatment accorded employers and unions" whereby employers, but not unions, had been permitted to withdraw from multi-employer bargaining "at any time" (91 NLRB, at 418; see, generally, id., at 413-420).

The Seventh Circuit refused to enforce the NLRB's decision in Morand, being of the view that lockouts were a lawful defense to whipsaw strikes, although discharge of the employees involved (rather than laying off those employees for the period of the lockout) would violate the Act. Morand Bros. Beverage Co. v. National Labor Rel. Bd., 190 F.2d 576 (7th Cir., 1951). [21] The

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21/ Upon remand, the NLRB found that the employees had been discharged rather than locked out for the duration of the whipsaw strikes, but reiterated its view that such a lockout was unlawful. 99 NLRB 1448 (1952). The Seventh Circuit enforced the holding that illegal discharges had occurred, but disapproved of the Board's disapproval of that court's prior opinion. 204 F.2d 529 (7th Cir., 1953).

Seventh Circuit also refused to "endorse the Board's reasoning that, once negotiations have been stalemated, a union may utterly disregard the employer unit with which it had theretofore bargained and proceed to fashion a new unit for bargaining purposes," but concluded that the union had not violated the Act for other reasons. 190 F.2d, at 582.[22/]

The NLRB followed its Morand decision, in Davis Furniture Co., et al. 94 NLRB 279 (1951), holding that a lockout in response to a whipsaw strike violated the NLRA; the Ninth Circuit disagreed, Leonard v. National Labor Relations Board, 197 F.2d 435 (9th Cir., 1952); the NLRB adhered to its decision upon remand, 100 NLRB 1016 (1952); and the Ninth Circuit then set the Board's order aside, 205 F.2d 355 (9th Cir., 1953).[23/] In Buffalo Linen Supply Company, 109 NLRB 447 (1954), however, the Board (without bothering to mention its Morand decision, although it was relied upon by the dissenting member) held that the non-struck members of a multi-employer unit could lockout as a defense to a whipsaw strike without violating the NLRA. Contrary to its Morand views, the Board in Buffalo Linen concluded that "the more reasonable inference is that, although not specifically announced by the Union, the strike against the one employer necessarily carried with it the implicit threat of future strike action against any or all of the other members of the [multi-employer] Association," and that the whipsaw strike constituted a "technique of exerting economic pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship," so that the "calculated purpose of maintaining

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22/ The Seventh Circuit stated that the "strike itself, if undertaken for the purpose of forcing [the struck employer] to select a different bargaining representative, would have been clearly violative of Section 8(b)(1)(B) of the Act," but concluded that the findings by both "the Trial Examiner and the Board . . . that it was an economic strike" were supported by sufficient evidence. 190 F.2d, at 581-582.

23/ The legality of the whipsaw strike was not at issue in Leonard. The partial quotation from that case at pages 37-38 of the union's brief was a passing dictum to the effect that the employers at least had as much right to lockout as the union did to whipsaw strike.

a strike against one employer and of threatening to strike others in the employer group at future times is to cause successive and individual employer capitulations." 109 NLRB, at 448.

The Eighth Circuit adopted the Board's reasoning in Buffalo Linen in refusing to enforce an earlier Board decision which had followed the Board's reasoning in Morand. National Labor Relations Bd. v. Continental Baking Co., 221 F.2d 427, 432 (8th Cir., 1955).[24] But the Second Circuit set aside the Board's Buffalo Linen decision, and agreed in substance with the Board's Morand decision except that the Second Circuit apparently would have permitted unions to withdraw from multi-employer bargaining at any time (rather than after an impasse) so as to equalize their rights in that regard to the withdrawal rights accorded by the NLRB to employers. Truck Drivers Local Union v. National Labor Rel. Bd., 231 F.2d 110, 116 (2d Cir., 1956).

The Supreme Court settled the matter by reversing the Second Circuit, thus adopting the NLRB's Buffalo Linen reasoning and rejecting its Morand reasoning. Labor Board v. Truck Drivers Union, 353 U.S. 87 (1957). The Court held that "a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's [whipsaw] strike action was lawful" under the NLRA (id., at 97), and stated, among other things, that while the NLRA does not expressly provide for multi-employer bargaining, its legislative history demonstrates that the "Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy

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24/ Betts Cadillac Olds, Inc., 96 NLRB 268 (1951), which also was decided after Morand and prior to Buffalo Linen, held that a lockout was lawful where justified by business reasons rather than as a defensive measure to protect a multi-employer bargaining unit from being destroyed by whipsaw strikes. The statement quoted from that case on page 37 of the union's brief was a dictum rather than a holding, and was followed by a citation to the Board's Morand decision.

of promoting labor peace through strengthened collective bargaining" (id., at 95). See, also, Labor Board v. Brown, 380 U.S. 278 (1965).

Subsequently, the NLRB dealt with the disparities in the right of employers and unions to withdraw from multi-employer bargaining in another manner. In Retail Associates, Inc., 120 NLRB 388 (1958), the Board indicated in dicta that employers (as well as unions) would not be allowed to withdraw from an established multi-employer bargaining unit (unless the other side acquiesced in the withdrawal) except in a timely and unequivocal manner, and that a withdrawal would not be timely (in the absence of unusual circumstances) if it occurred after negotiations upon a new contract commenced.[25] That position was definitively adopted in Evening News Association, 154 NLRB 1494 (1965), enforced, Publishers Association of New York City v. N.L.R.B., 364 F.2d 293 (2d Cir., 1966), and has been upheld in numerous cases. E.g., N.L.R.B. v. Pasketz, 405 F.2d 1201, 1202 (2d Cir., 1969); N.L.R.B. v. Southwestern Colorado Contractors Ass'n, 379 F.2d 360, 364 (10th Cir., 1967); Detroit Newspaper Publishers Ass'n v. N.L.R.B., 372 F.2d 569 (6th Cir., 1967).[26] It should be noted that an impasse in multi-employer bargaining was not included as a circumstance permitting withdrawal by either employers or unions from such bargaining.[27]

25/ Despite its statement in Morand that an employer could withdraw "at any time," in Retail Associates, the Board stated that the "right of withdrawal by either a union or employer from a multiemployer unit has never been held, for Board purposes, to be free and uninhibited, or exercisable at will or whim." 120 NLRB, at 393.

26/ The Board's Evening News decision has been criticized, however, on the ground that withdrawals from multi-employer bargaining by both employers and unions should be even more restricted. Detroit Newspaper Publishers Association v. N.L.R.B., supra at 571-572. And see, e.g., Comment, 1967 Duke L.J. 558, 579-583 (1967); Note, 41 N.Y.U. L.R. 651 (1966); Note, 44 Texas L.R. 1047 (1966). Of course, in circumstances where multi-employer bargaining is obligatory under the Railway Labor Act as construed in the Atlantic Coast Line case, a withdrawal at any time without the consent of the other side would not be permissible. See fn. 20, p. 34, supra.

27/ The most complete discussion of the "impasse" concept as applied under the NLRA, that we have discovered, is the article by Epstein, cited at page 28 supra. There is no suggestion in that article that the concept is relevant to withdrawals from multi-employer bargaining.

Local Union 49 of the Sheet Metal Workers, Etc., 122 NLRB 1192 (1959), appears to have been the first case decided by the NLRB in which a union was charged with violating the NLRA by reason of whipsaw strikes. Despite a history of bargaining on a multi-employer basis, the union refused to continue to do so, sought to persuade members of the multi-employer association to bargain individually, and called a selective strike. An opinion by a hearing examiner, approved by the Board insofar as here relevant, held that the union's conduct violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA.[28] In so holding, the examiner stated, among other things, that "the record permits no escape from the conclusion that the refusals to bargain, and the strike (whatever other purpose it had had) were implementations of a design by . . . the Union to drive a coercive wedge between the Association and the employers it represents with the object of compelling the employers to abandon the Association as their collective-bargaining representative and to substitute individual for group bargaining." 122 NLRB, at 1209.

The decision in Arizona District Council of Construction, Etc., 126 NLRB 1110 (1960),[29] reached a contrary result, but thereafter the Board in a long

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28/ Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" (29 U.S.C. § 158(b)(1)(B)), and thus is similar to Section 2 Third of the Railway Labor Act (45 U.S.C. § 152 Third). Under Section 8(b)(3), it is an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees" (29 U.S.C. § 158(b)(3)), and "bargain collectively" is defined in Section 8(d) to including bargaining "in good faith" (29 U.S.C. § 158(d)), so that Section 8(b)(3) is similar to Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First).

29/ That case did not, however, distinguish the situation before or after an impasse, and apparently considered whipsaw strikes to be lawful at any time. See the union's brief, at 38. There is also some language to the contrary in Lumber and Sawmill Workers, Local 2647, Etc., 130 NLRB 235 (1961), enforced, Cheyney California Lumber Company v. N.L.R.B., 319 F.2d 375 (9th Cir., 1963). See the union's brief at 38-39. But, the Board apparently concluded that a true multi-employer

(Cont'd next page)

line of decisions has held that a union violated Section 8(b)(1)(B) or Section 8(b)(3) or both where it sought to break up an established multi-employer bargaining unit and coerce the members of that unit into making individual agreements by means of selective or whipsaw strikes. General Teamsters Local Union No. 324, Etc., 127 NLRB 488 (1960); Hoisting & Portable Engineers Local 701, Etc., 141 NLRB 469 (1963); Westchester County Executive Committee, Etc., 142 NLRB 126 (1963); Ice Cream, Frozen Custard Employees, Local 717, 145 NLRB 865 (1964); Int'l Union of Operating Engineers, Local 825, 145 NLRB 952 (1964); Operative Plasterers, Etc., Local No. 2, 149 NLRB 1264 (1964); Orange Belt Dist. Council of Painters No. 48, Etc., 152 NLRB 1136 (1965); Painters Local No. 823, 161 NLRB 620 (1966); Enterprise Association, Etc., 170 NLRB No. 44 (1968); United Slate, Tile & Composition Roofers, Etc., 172 NLRB No. 249 (1968); Local 964, United Brotherhood of Carpenters and Joiners, 181 NLRB No. 154 (1970).

In some of those cases, including the one last cited--see the union's brief at 39--the Board found that multi-employer negotiations were not at an impasse, but most of the cases disregarded the impasse concept altogether and none of them held that whipsaw strikes are lawful after an impasse in multi-employer negotiations. In addition, We Painters, Inc., 176 NLRB No. 140 (1969), upon which the union purports to rely (Br., at 39-40), demonstrates the irrelevancy of the impasse concept in a different but related context, holding that an employer

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((ont'd) unit was not involved in that case. Thus, it stated (130 NLRB, at 238) that: "Pine [the multi-employer representative] had been designated by the [struck] Company to act as bargaining agent 'for the purpose of recommendation only.' The Company retained full freedom to accept or reject recommendations that might be made by Pine. The General Counsel alleged and the Trial Examiner found that the Company's employees constituted a separate appropriate unit. There is therefore no issue of a possible refusal to bargain arising out of an attempt to break up a multiemployer bargaining unit." International Hod Carriers, Etc., Local 1082, 150 NLRB 158 (1964)--see the union's brief at 39--also is a case in which the Board found that a multiemployer unit did not exist.

violated the Act by refusing to accept a contract negotiated with the union by a multi-employer association of which the employer is a member. After an impasse in the multi-employer bargaining, the union negotiated individual contracts with some members of the association and the employer in question notified the association that it was withdrawing from the multi-employer unit. The union was not notified of and did not consent to this purported withdrawal, the association continued to bargain with the union and the multi-employer contract which the particular employer refused to accept eventually was agreed upon by the association and the union.

In rejecting the employer's contention that the union had abandoned the multi-employer unit by making individual contracts with some of its members, the Board pointed out that the association "might have dissolved itself as a multi-employer unit, or preferred charged against the Union," but it "did neither." TDX 4. Rather, the association continued to seek a multi-employer contract and executed such a contract. In such circumstances, where the association did not dissolve itself the union could not escape its obligation to bargain on a multi-employer basis by its actions in making individual agreements with some members of the association, although such actions could have been the basis for charges against the union, and thus "did not thereby yield its identity as a bargaining principal vis-a-vis" the association. Ibid. The Board also rejected the employer's contention that it could withdraw from the multi-employer unit without the consent of the union after an impasse in multi-employer bargaining. The impasse "did not automatically dissolve the bargaining relationship or mark an abandonment of efforts to reach an agreement," and under the Board's decisions "from the time negotiations on a contract begin until such time as it may be said

they have been abandoned, an employer in a multiemployer unit can effectively withdraw from such unit only with the consent or acquiescence (actual or implied) of the union, or if otherwise timely, after notification of the union in clear, unequivocal language." Ibid. As we have shown on p. 38, supra, the rule that withdrawals from multi-employer bargaining are not permissible (in the absence of consent or unusual circumstances) applies to withdrawals by unions as well as to withdrawals by employers. Thus, as the Board pointed out, the association could have "preferred charges against the Union" even though its individual agreements and strikes occurred after an impasse in multiemployer bargaining.

The foregoing discussion of the decisions under the National Labor Relations Act is far more lengthy than the subject deserves in this case arising under the Railway Labor Act. In view of the Sheet Metal Workers union's heavy reliance upon the NLRB's Morand decision and in fairness to Judge Corcoran, however, we concluded that we should demonstrate in some detail that that decision no longer expresses the views of either the NLRB or the courts and that Judge Corcoran was correct in noting that "a union violates the National Labor Relations Act when it begins bargaining on a multi-employer level and then attempts to force individual agreements by whipsaw striking individual members of the multi-employer unit."

CONCLUSION

The appeal by the Sheet Metal Workers union should be dismissed and the case remanded with instructions to vacate the preliminary injunction order and

dismiss the complaint, without prejudice, as moot, for the reasons stated in support of Appellees' Motion to Dismiss Appeal as Moot. If the Court should deny that motion, however, it should affirm the decision below for the reasons stated in this brief.

Respectfully submitted,

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APPENDIX

Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.

Section 1 Sixth, 45 U.S.C. § 151 Sixth

The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Section 2, 45 U.S.C. § 151a

The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2 First, 45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 Second, 45 U.S.C. § 152 Second

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Section 2 Third, 45 U.S.C. § 152 Third

Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

SUPPLEMENTAL BRIEF FOR APPELLEES

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 24,217

ALTON & SOUTHERN RAILWAY COMPANY, ET AL.,

Appellees,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,

Appellant.

On Appeal from an Order of the United States District Court
for the District of Columbia

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SUPPLEMENTAL BRIEF FOR APPELLEES

This supplemental brief is being filed by Appellees (hereinafter referred to as the "carriers") in order to bring to the attention of the Court certain authorities, decided since the Brief for Appellees was filed on October 30, 1970, which provide additional support for Appellees' Motion to Dismiss Appeal as Moot and for affirmance of the decision below in the event that the Court denies that motion and reaches the merits of the case. Of particular importance in both respects is the decision by this Court on March 31, 1971 in Delaware and Hudson Railway Company v. United Transportation Union, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 71-1183), cert. den., ___ U.S. ___, 39 Law Week 3537 (June 7, 1971). That decision will hereinafter be

referred to as the "Delaware and Hudson" decision. As it has not yet been officially reported[1], page references will be to the slip opinion.

A. Mootness.

As is pointed out in Appellees' Reply to Appellant's Opposition to Motion to Dismiss Appeal as Moot, at pp. 8-11, Appellant (hereinafter referred to as the "Union") seeks to sustain the viability of its appeal in this case, despite the settlement of the underlying labor dispute and the consequent expiration of the preliminary injunction being appealed, by reliance upon the principle that an appeal is not mooted by the fact that the order appealed from has expired, where the "questions involved in the orders . . . are usually continuing . . . and their consideration ought not be, as they might be, defeated, by short term orders, capable of repetition, yet evading review. . . ." The Delaware and Hudson decision demonstrates in the most concrete way possible that a preliminary injunction against so-called selective or whipsaw strikes is not a "short term order, capable of repetition, yet evading review," so as to come within that principle. Review of such an order was had in that case before it expired by the normal course of simply abiding by the order and maintaining the status quo until review could be had.

Hence, it is now clear as a matter of demonstrated fact that such preliminary injunction orders are not intrinsically short term in nature. The order being appealed in this case expired because the Union was unwilling to maintain the status quo pending its appeal, and called a national strike

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1/ It has been unofficially reported at 76 LRRM 2900 and 65 Labor Cases ¶ 11,629.

which instigated the Congress to impose a legislated settlement of the underlying labor dispute, rather than by reason of an express limitation upon the term of the order or an implied limitation inherent in the circumstances to which the order applied. The situation for purposes of mootness is no different from one in which the parties settle a labor dispute by agreement while an appeal from a strike injunction entered in litigation arising out of that dispute is pending. There can be no doubt about the mootness of such an appeal (see the cases cited on pages 6-8 of Appellees' Motion to Dismiss Appeal as Moot), and we submit that there similarly can be no doubt that this appeal has been mooted by P.L. 91-226, which commands that "the memorandum of understanding, dated December 4, 1969, shall have the same effect . . . as though arrived at by agreement of the parties under the Railway Labor Act. . . ." (see Appellees' Reply, at 3-4).

In addition to the cases previously cited in that regard, we desire to call to the Court's attention the recent decision in Detroit, Toledo & Ironton R.R. v. BLE, 77 LRRM 2813 (E.D. Mich., 1971). Subsequent to the issuance of a preliminary injunction against strikes over a labor dispute arising out of a Section 6 notice served by the BLE, that Section 6 notice was withdrawn by the BLE. Upon motion of the BLE and over the opposition of the carrier, the case was dismissed as moot since:

> "In the case at bar, the §6 Notice, which provoked this controversy in the first place, has been withdrawn. Therefore, this Court no longer has the underlying controversy before it."

77 LRRM, at 2814. This was true even though the legal issue involved (the bargainability of certain proposals made in the Section 6 notice) "is

unresolved and remains alive." Ibid. If the withdrawal of the Section 6 notice sufficed to moot that case, certainly the final disposition of the Section 6 notices involved here should suffice to moot this case.

The Delaware and Hudson decision also should satisfy the extra-legal considerations which purportedly motivated the Union to pursue this appeal (see Appellant's Opposition to Motion to Dismiss Appeal as Moot, at 5-8), and which the Union contends make a decision of the issues as to the validity of selective strikes in the "public interest" even though that factor concededly is not grounds for deciding a moot appeal (see id., at 23-24). There now is an appellate decision concerning the application of the Railway Labor Act to selective strikes to guide the Union in future disputes. Since selective strikes are neither per se legal or illegal under that decision, and the legality of such strikes depends upon the particular circumstances, the application of the principles thus established to the particular facts of this settled dispute cannot have more than academic interest. And, if the present motivation of the Union is a desire to overturn unfavorable aspects of the Delaware and Hudson decision, as appears probable,[2/] this settled dispute certainly is not a proper vehicle for such an endeavor. As recently as August 5, 1971, this Court entered an order in another selective strike case, arising out of a labor dispute which has not been settled, summarily remanding the case (without hearing oral argument) "to remain on the docket of the District Court and subject to the District Court's continuing

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2/ When asked by an attorney for the carriers whether this appeal would continue to be pressed in view of the Delaware and Hudson decision, an attorney for the Union responded that the Union intended to seek a "second bite" and thus would continue to press its appeal.

jurisdiction, for such further proceedings as may become appropriate, not inconsistent with the opinion of this Court in" the Delaware and Hudson case. United Transportation Union v. Burlington Northern Inc., No. 71-1394. Since Delaware and Hudson has thus been deemed to be dispositive of the principles governing the validity of selective strikes in a live dispute, the Court cannot reasonably be expected to reconsider its Delaware and Hudson decision in the context of a dispute that has long been settled.

B. The Merits.

While we believe that this appeal is moot, we also believe that the Delaware and Hudson decision requires affirmance of the order below if the Court does not dismiss the appeal and reaches the merits of that order. If this Court should undertake to reconsider the principles established by its Delaware and Hudson decision, we submit that the Court should decide that selective or whipsaw strikes in connection with multi-carrier labor disputes arising under the Railway Labor Act are illegal per se rather than only in certain circumstances as held in Delaware and Hudson.

Both Delaware and Hudson and this case arose out of a national wage and rules dispute which had been handled on a multi-carrier basis (commonly referred to in the railroad industry as "national handling") throughout the procedures required by the Railway Labor Act. In both cases, those procedures (conferences, mediation and investigation by an emergency board) had been exhausted, and the union or unions involved had called strikes (without prior notice) against only a few (one in this case and two in Delaware and Hudson) of the carriers involved in the dispute. In both cases, the District

Court issued a preliminary injunction prohibiting such selective or whipsaw strikes, and both cases thus raised issues concerning the interpretation and application of the Railway Labor Act to selective or whipsaw strikes.

Moreover, in both cases the carriers introduced evidence that a normal and foreseeable result of selective strikes is to coerce the struck carriers to bargain separately with the striking union, thus disrupting national handling. But, in Delaware and Hudson there was no other evidence of an intent on the part of the union to coerce individual bargaining and agreement, and the President of the union not only denied such an intent but testified that the union would refuse to bargain or agree on an individual basis. See Slip Op., at 26-31, 41-61.[3/] In this case, on the other hand, the Union actually solicited individual bargaining on the part of several carriers who were selectively struck prior to the appointment of an emergency board, and counsel for the Union judicially admitted that the purpose of the selective strike following the report of the emergency board was "to go back to the starting point and reach it [agreement] if possible on a single carrier basis." See A 30-31, 155; Brief for Appellees, at 9-12. Consequently, while Judge Pratt for the District Court in Delaware and Hudson held selective strikes to be illegal even if for the purpose of coercing a national agreement, under what this Court in Delaware and Hudson referred to as "the so-called 'hostage' issue" (Slip Op., at 27; see, generally, at 26-31), Judge

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3/ In fact, following remand of the Delaware and Hudson decision, one of the carriers selected to be struck (the Chicago and North Western Railway Company) was coerced into withdrawing from national handling, and the UTU bargained and agreed separately with that carrier. Thus, the subsequent events in that dispute both confirmed the carriers' view as to the foreseeable consequences of selective strikes and revealed the flimsiness of the UTU's testimony that it would not bargain or agree separately.

Corcoran for the District Court in this case, as his opinion was authoritatively construed by this Court in Delaware and Hudson, did not reach that issue (see Slip Op., at 12), and grounded his decision upon the view--approved by this Court in Delaware and Hudson, as we shall show--"that the duty to bargain collectively on a multi-employer basis is violated when a union 'attempts to force individual agreements' by striking individual members" (Slip Op., at 12).

Under the principles established by this Court in Delaware and Hudson, this difference in the evidence and findings as to the purpose of selective strikes in that case as compared to this case is critical. This Court adopted the view, which had been expressed by Judge Parker for the District Court in the Burlington Northern case,[4/] that "when collective bargaining has come to an impasse and all procedures of the Railway Labor Act have been exhausted, it is not unlawful for the Union to call a strike against some or a few of the carriers in order to put pressure on the railroads to reach a national multi-employer agreement" (Slip Op., at 14), but it is unlawful in such circumstances "to coerce individual carriers into disrupting the multi-employer bargaining unit and settling on an individual basis" (Slip Op., at 15).

In reaching that conclusion, this Court discussed at length the decision below in this case by Judge Corcoran and construed that decision--as well as Judge Parker's decision in Burlington Northern--as being compatible with this Court's interpretation of the Railway Labor Act as applied to selective strikes.

After noting that "Judge Corcoran correctly understood the import and implication of our Atlantic Coast Line ruling" and assuming that Judge Corcoran

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4/ The order entered by Judge Parker was expressly affirmed and the case remanded for further proceedings not inconsistent with the Delaware and Hudson opinion, in the August 5, 1971 order in No. 71-1394 referred to on pp. 4-5, supra.

"was likewise sound" in holding that "[n]ational handling was appropriate and obligatory as to the disputes involved in the Alton case,"[5/] this Court quoted "the relevant portion of the opinion" of Judge Corcoran in this case, (Slip Op., at 11), and stated (Slip Op., at 12) that:

> "While there is general language that may be abstracted as indicating that any strike against a single employer of a national bargaining group is illegal, that language must be discounted since the decision was not concerned with the problem now before us. Detroit & Toledo Shore Line R. Co. v. UTU, 396 U.S. 142, 156 (1969). On the contrary, perceptive and careful study of the matter reveals that the core of Judge Corcoran's opinion rests on his determination that the Railway Labor Act is properly construed in present context with the same approach as that used for the National Labor Relations Act, and that the latter has been construed as holding that the duty to bargain collectively on a multi-employer level is violated when a union 'attempts to force individual agreements' by striking individual members."

5/ The Union did not question below the carrier's contention that national handling of the underlying labor dispute was appropriate and obligatory under Atlantic Coast Line, although it contended that the principles declared in that case are inapplicable once the procedures of the Act are exhausted (A 177-178, 245-246). That contention obviously is erroneous as the procedures of the Act had been exhausted in the dispute involved in Atlantic Coast Line, and this Court in Delaware and Hudson left no doubt about the continuing nature of the obligation to bargain on a multi-carrier basis (Slip Op., at 17). In the Reply Brief for Appellant, at 17-21, the Union attempts to denigrate the Atlantic Coast Line principles as "dictum" (id., at 18), and contends that "dictum to be entirely wrong" (id., at 20), as well as contending that Judge Corcoran erred in finding national handling of this dispute to be appropriate and obligatory (id., at 19). Delaware and Hudson disposes of the first two contentions. While this Court in Delaware and Hudson assumed rather than approved the correctness of Judge Corcoran's application of the Atlantic Coast Line principles to the facts of this case, the Court did hold that the carriers' counterproposals of changes in work rules in that dispute were "sufficiently germane . . . to require handling at the same time and manner as the wage issue" (Slip Op., fn. 14, at 13). In this dispute, as in the Delaware and Hudson dispute, the Union requested national handling and such national handling was in fact had in regard to the carriers' counterproposals as well as in regard to the Union's wage proposals. See Brief for Appellants, at 23-24. Thus, the Union's contention that "incidental work" disputes have been handled on a local basis for

(Cont'd next page)

This Court then discussed and approved the principles declared by Judge Parker in the Burlington Northern case (Slip Op., at 14-15); noted that "Judge Parker's ruling also is in accord with the rulings under the National Labor Relations Act which, as Judge Corcoran noted in Alton, are material, though not decisive, in defining duties under the Railway Labor Act" (Slip Op., at 15); and concluded this aspect of the Delaware and Hudson opinion by summarizing (Slip Op., at 16-17) that:

> "As Alton points out the duty is to bargain in good faith, which means an absence of bad faith, and an effort to pursue single agreements may be taken as undercutting an obligation to conduct national bargaining in good faith. But an effort to pursue a national agreement by increasing the use of non-violent economic pressure is subject to no such condemnation."

This Court subsequently recurred to the foregoing discussion of Judge Corcoran's decision in this case, to note (Slip Op., at 31) that, "as we have already pointed out it is not a sound reading of Alton and earlier opinions to say that they condemn all selective strikes and to gloss over the all-important question of whether the selective strike is one that seeks to disrupt national bargaining by achieving individual agreements," and further stated in footnote 26 to the sentence which we have just quoted that (Slip Op., at 31-32):

(Cont'd) nearly 50 years (Reply Brief, at 19) is immaterial, but we note that it is also erroneous. The Union's citation to A 12-13 is incomprehensible, and its citation to A 81 is to a portion of the Report by Emergency Board No. 176. That Report (see A 80), as does the carriers' affidavits (see A 26-27), recognizes that classification of work (which includes incidental work) has been the subject of a national rule since about 1920, with minor exceptions, and Board No. 176 recommended that the parties make a national agreement "which will afford greater flexibility in the use of mechanics" (A 82).

> "We revert to our earlier discussion. While Alton contains some general expressions as to selective strikes, its core doctrine, properly analyzed, is one that permits an injunction when the Union undercuts its duty under the Act to continue national bargaining by its striking individual carriers in an attempt to force individual agreements. . . .
>
> "Alton is entirely congruent with Judge Parker's judgment in Burlington (supra, pp. 14-15) that a selective strike is 'a legitimate economic tool which the union can exert against carriers involved in national handling negotiations so long as the union continues to seek a national agreement by applying economic pressure on the carriers without seeking to coerce individual carriers into disrupting the multi-employer bargaining unit and settling on an individual basis.' . . ."

In short, there can be no doubt whatsoever about the fact that this Court, in Delaware and Hudson, approved the "core doctrine, properly analyzed" applied by Judge Corcoran in issuing a preliminary injunction in this case. Unless the Court is prepared to reconsider the principles which it thus approved in Delaware and Hudson, the only open question is the application by Judge Corcoran of those principles to the facts of this case. While this Court of course did not review that question in Delaware and Hudson, we cannot perceive why it either would or should undertake to do so now in view of the settlement of the underlying labor dispute and the consequent expiration of the preliminary injunction entered by Judge Corcoran.

But however that may be, we have already noted that there is substantial evidence in this record--including a judicial admission by trial counsel for the Union and active solicitation by the Union of separate bargaining by selectively struck carriers--that the Union here did have a purpose of coercing individual bargaining and agreement, thus disrupting

national handling. As its trial counsel conceded, the Union intended "to go back to the starting point and reach [agreement] if possible on a single carrier basis." See p. 6, supra. Moreover, this Court pointed out in Delaware and Hudson (Slip Op., at 35-36), where "the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and do novo in the appellate court," but the "matter stands in a different posture . . . when there is no question or disagreement as to the legal principle involved, and the element of probability of success on the merits depends on a forecast as to the shape of the facts likely to emerge at trial." And, of course, even on review of a final judgment, the trial court's findings of fact will not be set aside unless clearly erroneous. Rule 52(a) F.R. Civ. P.

The Union's contention (Reply Brief, at 9; see, generally, at 5-9) that "Judge Corcoran did not find that individual agreements were either the 'purpose' or the 'inevitable effect' of the selective strike" as "he appeared to regard this as irrelevant to his decision," since his "holding was that selective strikes, following national handling, are unlawful irrespective of the purpose of the strike," (emphasis by the Union), is, of course, squarely refuted by this Court's conclusion in Delaware and Hudson that: "While Alton contains some general expressions as to selective strikes, its core doctrine, properly analyzed, is one that permits an injunction when the Union undercuts its duty under the Act to continue national bargaining by striking individual carriers in an attempt to force individual agreements." See p. 10, supra, and more generally, pp. 7-10, supra.

Delaware and Hudson also squarely refutes the Union's contention (Brief, at 24-43; Reply Brief, at 9-17) that selective strikes are lawful, regardless of their purpose, after an impasse is reached in national multi-employer bargaining. We assumed, because of the Union's purported reliance upon decisions under the National Labor Relations Act, that the Union meant an impasse as defined under that Act, and demonstrated in our initial brief that there is no evidence that such an impasse existed when the Union called its selective strike and that the application of such a concept would lead to nonsensical results (Brief, at 25-33), as well as showing that the Union's understanding of the decisions under the NLRA is erroneous (Brief, at 33-42). In its Reply Brief (pp. 14-15), however, the Union says that it assumes "that exhaustion of the statutory procedures under the Railway Labor Act is the equivalent of arriving at an impasse under the NLRA. . . ." (Emphasis by the Union.)

Of course, the procedures of the Railway Labor Act had been exhausted in regard to the dispute involved in Delaware and Hudson (see Slip Op., at 7-10). Until that is done, any resort to self-help is unlawful. Thus, in holding that the validity of selective strikes at their inception is dependent upon a purpose "to put pressure on the railroads to reach a national multi-employer agreement" (Slip Op., at 14), this Court obviously rejected the view--urged by the Union here--that any selective strike is valid, regardless of its purpose, once the procedures of the Act have been exhausted. And, this Court affirmatively "accept[ed]" the carriers' "premise that as to this dispute they have a continuing right to bargain and agree as a group through joint national representatives, and that the Union has a reciprocal

obligation to respect that right" (Slip Op., at 17), and approved the view which it attributed both to Judge Corcoran in this case and to Judge Parker in the Burlington Northern case that selective strikes are illegal--even though the procedures of the Act have been exhausted--when the union seeks "to coerce individual carriers into disrupting the multi-employer bargaining unit and settling on an individual basis" (Slip Op., at 14-15, 16-17, 31-32 (fn. 26)). See pp. 7-10, supra. Furthermore, this Court similarly construed the decisions under the National Labor Relations Act as making the validity of selective strikes dependent upon whether or not they are intended to coerce multi-employer or individual agreement, rather than upon whether or not an impasse had been reached in the negotiations. Slip Op., at 12, 15-16.[6/]

The carriers obviously are not happy with all aspects of the Delaware and Hudson decision. But as we pointed out in moving for a summary remand of their appeal from the order by Judge Parker in the Burlington Northern case, we did not believe that we could justify "taking the time of the Court to consider a full-scale briefing and argument" of that appeal, unless requested by the Court, since "such a briefing and argument would serve a useful purpose only if this Court is willing to reconsider its Delaware & Hudson decision, and we have no reason to expect that to be so in view of the recency of that decision and the absence of any intervening contrary decisions by other courts." Appellants' Motion for A Summary Remand, filed

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6/ See, also, pp. 33-42 of the Brief for Appellees filed in this case. Since that brief was filed, Local 1205, International Brotherhood of Teamsters, 191 NLRB No. 147 (1971), also held that selective strikes violated Sections 8(b)(1)(B) and (3) of the NLRA. Among other things, the trial examiner concluded that Morand does not represent "the current thinking of the Board. . . ." TXD 23. See also, Kennedy v. Local 12, Operating Engineers, 73 LRRM 2755 (C.D. Cal., 1970). Moreover, NLRB v. Johnson Sheet Metal, Inc., 77 LRRM 2245, 2248 (10th Cir., 1971), rejected a contention by an employer that its withdrawal from a multi-employer unit, after negotiations commenced but before a multi-employer agreement was reached, was justified by an impasse in the negotiations, in enforcing an order of the NLRB against that employer.

in No. 71-1394 on June 16, 1971, at 11. As we have pointed out (pp. 4-5, supra), this Court did summarily remand that case for further proceedings in accordance with the Delaware and Hudson decision, as requested by the carriers. No further proceedings are necessary here (other than dismissal of the case below as moot) as the underlying labor dispute has been settled, and we certainly see no reason why the Court's time should be consumed to hear argument in this case or to expect that the Court will be willing to reconsider its Delaware and Hudson decision in the context of a settled dispute which cannot now give rise to any strike--selective or otherwise. However, since counsel for the Union has refused our suggestion that this appeal be voluntarily dismissed (see fn. 2, p. 4, supra) and the carriers' motion to dismiss has been set down for argument together with the argument on the merits, we have no option but to prepare and request leave to file this supplemental brief and to participate in the oral agreement.

While we continue to see no reason to expect the Court to reconsider on this appeal the principles governing the validity of selective strikes subject to the Railway Labor Act which were established by the Delaware and Hudson decision, if the Court should undertake such reconsideration we urge the Court to conclude that all selective strikes are unlawful in situations where national handling has been had or is obligatory, including such strikes where the union purports to be striking for the purpose of coercing a national agreement only. No individual carrier has the power to dictate the terms of a national offer or agreement, and the effect upon the selectively struck carrier is the same regardless of the announced purpose of the strike.

In our view, the fundamental error of the Delaware and Hudson opinion is its failure properly to apply the general "common-law rule that a man is held to intend the foreseeable consequence of his conduct," so that "his protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement." Radio Officers v. Labor Board, 347 U.S. 17, 45 (1954). It is not necessary that the particular consequence always result or that it result in the particular case in order for that rule to apply, but only that it be a possible consequence which could reasonably be foreseen in the generality of circumstances. Thus, Radio Officers applied the rule so as to hold a employer to intend a consequence which in the particular case not only did not occur, but could not have occurred.[7/] And, in Labor Board v. Truck Drivers Union, 353 U.S. 87 (1957), the Supreme Court upheld the right of non-struck employers to lockout so as "to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action" against one member of the multi-employer group, 353 U.S., at 97, even though the "facts" in that particular case "clearly show that the Union strike was not an attempt to withdraw from the multi-employer bargaining

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7/ One of the cases (Gaynor) decided in the Radio Officers opinion involved an employer who increased the wage paid to employees who were union members, pursuant to an agreement with the union, but did not give similar increases to non-union employees doing the same work. It was conceded that in fact, "the employer acted from self-interest and not to encourage unionism" in refusing to give the wage increase to non-union employees. Moreover, all of those employees were ineligible for membership in the union (which admitted "only first-born legitimate sons of members"), and all had previously applied to and been rejected by the union for membership. 347 U.S., at 35-36. Nevertheless, the employer was held to have intended "to encourage . . . membership" in the union by the wage "discrimination" between union and non-union employees, and thus to violate the NIRA, because "a natural consequence" of paying higher wages "to union employees doing a job than to non-union employees doing the same job" is the "encouragment of membership in such union," and the employer must be held to have intended that "natural consequence" despite the circumstances of the particular case. 347 U.S., at 46.

unit," and the union had "continued to carry on negotiations with the "multi-employer representative until an agreement was reached and signed," 353 U.S., at 94, fn. 22.[8/]

We also believe that this Court in Delaware and Hudson misconceived the true impact of the selective strike decisions under the National Labor Relations Act. The Arizona District Council decision, upon which this Court relied (Slip Op., at 15-16), in our opinion is an aberration. Insofar as we have been able to discover, it has not since been cited or followed, and the NLRB for many years has consistently found that selective strikes do violate the NLRA, in situations where multi-employer bargaining is required. See the cases cited on p. 40 of the Brief for Appellees and in fn. 6, p. 13, supra.

Other reasons for our view that all selective strikes are prohibited by the Railway Labor Act, in situations where national handling is had or is obligatory, may be found in the Brief for Appellees and in the briefs filed by the carriers in the Delaware and Hudson case. We do not feel justified in

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8/ While we think the point is immaterial, we note that this Court's reliance in Delaware and Hudson (Slip Op., at 22) on Judge Parker's statement in Burlington Northern to the effect that "during the past twenty years there were a number of of instances when the railroad union had exercised the right to individual or selective strikes even though the underlying dispute was the subject of national handling, including the 1950 strike against eight carriers which led to the National Diesel Agreement of May 17, 1950," is unjustified. Judge Parker cited various reports of the National Mediation Board (see 325 F. Supp. 1125, 1129-1130) which, as reading will demonstrate, are very brief in extent and general in nature insofar as relevant. The Affidavit of Daniel P. Loomis, filed on March 25, 1971 in Burlington Northern in support of the carriers' motion for reconsideration, demonstrates that those strikes in fact either were not selective in nature or were terminated almost immediately by Government seizure before effective pressure for agreement (either individual or national) could be exerted, with the exception of the strikes that preceded the National Diesel Agreement of 1950. In that dispute, the BLF&E was demanding two firemen on road locomotives. Because of the obviously extravagant nature of that demand and the active opposition of the BLE (which was then demanding two engineers on road locomotives), the picket lines generally were not respected and the strikes were not effective to pressure either individual or national agreement, so that the BLF&E capitulated and agreed to the terms that previously had been offered by the carriers.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24, 217

ALTON & SOUTHERN RAILWAY COMPANY, et al.,

Plaintiffs-Appellees,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.,

Defendants.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

Defendant-Appellant.

Appeal From a Preliminary Injunction Issued by the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

The carriers' brief proceeds down so many bizarre by-ways that we are compelled to make this reply.

I. THE COURT BELOW DID NOT HAVE "DISCRETION" TO ENJOIN A LAWFUL STRIKE.

The carriers' first contention is that the basic legal question --- the lawfulness of the selective strike --- is not squarely before this court. They assert that "in terms of the standards governing review by this Court, the Sheet Metal Workers Union must persuade the court that there is no reasonable basis for a conclusion by the District Court that the carriers did demonstrate 'a substantial likelihood of success on the merits' so that the District Court abused its discretion in issuing the preliminary injunction" (Carriers' brief, pages 16-17). They urge that the decision below, even if "doubtful", was "surely ... not so unreasonable as to permit this court to conclude that the District Court abused its discretion in issuing the preliminary injunction" (Carriers' brief, page 17).

The carriers misconceive the appropriate standard for review. To be sure, the district courts have "discretion" with respect to most of the considerations which go into the decision whether to issue a preliminary injunction (e.g., the existence of irreparable injury, balancing of the equities, resolution of factual questions, etc.), and the scope of appellate review is limited accordingly. However, where, as here, the facts are not disputed and the propriety of an injunction turns solely upon the correct interpretation of the law, the scope of appellate review is broader. As this Court has so often noted, the scope

of appellate review includes "whether the trial judge abused his discretion in granting the injunction, or rested his analysis upon erroneous premises." A Quaker Action Group v. Hickel, 421 F.2d 1111, 1115 (D.C. Cir. 1969) (emphasis added)1/ District 50,United Mine Workers v. International Union, 134 U.S. App. D.C. 34, 412 F.2d 165, 166 (1969); Perry v. Perry, 88 U.S. App. D.C. 337, 338, 190 F.2d 601, 602 (1951).

As Judge Friendly stated in Empressa Hondurena De Vapores, S.A. v. McLeod, 300 F.2d 222, 231 (2d Cir. 1962):

> "Although the appeal is from denial of a temporary injunction, there appears to be no real dispute on factual matters... The issue being one of law, the standard is whether we think the District Judge was wrong, not whether he was 'clearly' so."

Similarly, Judge (now Justice) Marshall explained in McLeod v. Business Machine and Office App. Mech. Conf. Bd., 300 F.2d 237, 239 (2d Cir. 1962):

> "Because there is no dispute as to the material facts in evidence and because we are faced solely with questions of law, we need decide only whether the Judge below was wrong, not whether he was 'clearly' so."

See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584-585 (1952); U. S. v. Corrick, 298 U.S. 435.

1/ In Quaker Action, this Court declined to resolve certain constitutional questions, relying "particularly" on the fact that "the Government has stipulated to the truth of the plaintiffs' affidavits only for the purposes of the preliminary injunction." 421 F.2d at 1115. Thus in Quaker Action, unlike here, the possibility of factual disputes still existed.

This doctrine is particularly important here, where the injunction had so devastating an effect upon appellant's fate. In District 50, supra, this Court recognized that the greater the stakes involved in the issuance of a preliminary injunction, the more closely the Court of Appeals must scrutinize the propriety of its issuance. 412 F.2d at 168.

We have shown that the general principles applicable to appellate review of preliminary injunctions did not leave the District Court "discretion" to apply an erroneous construction of the law in this case. But even if the general principles were not so clear, the same result would be dictated by the Norris-LaGuardia Act. Norris-LaGuardia is applicable to strikes permissible under the Railway Labor Act. Order of Railroad Telegraphers v. Chicago & N.W.R.Co., 362 U.S. 330 (1960). By its terms, Norris-LaGuardia deprives the federal courts of "jurisdiction" to enjoin a strike which is lawful under the Railway Labor Act. Id. at 343. Although the Supreme Court has never so held, this Court has held that Norris-LaGuardia does not preclude an injunction against a "major dispute" strike which violates the Railway Labor Act. Brotherhood of Railroad Trainmen v. Akron & B.B.R.Co., 128 U.S. App. D.C. 59, 91, 385 F.2d 581, 613 (1967), cert. denied 390 U.S. 923 (1968). Accordingly, a determination of the basic legal question here -- whether the strike was lawful -- is a prerequisite to establishing whether the court below had jurisdiction to issue its injunction.2/ That

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2/ In the court below, the unions argued that Norris-LaGuardia deprived the court of jurisdiction to enjoin the strike. The court concluded otherwise, because of its holding that the strike was a violation of the Railway Labor Act (A.345-346).

being so this court must decide, as a matter of law, whether the strike was lawful, for if it was the court below lacked jurisdiction to enjoin it. Judge Friendly made this clear in Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union, 292 F.2d 61 (2d Cir. 1961). There, the plaintiffs, having secured a preliminary injunction from the district court, "urge that since it is only a temporary injunction we are reviewing.... the only point open to review is whether... this... finding was clearly erroneous..." (Id. at 70). The court rejected this approach:

> "/N/o such principle as plaintiffs advocate can be applicable to a claim that such an injunction transgresses the command of § 4 of the Norris-LaGuardia Act. That section uses the most emphatic words possible -- 'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction' against a peaceful strike. To overcome that bar plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent." (292 F.2d at 71, emphasis added).

For all of the foregoing reasons, we submit that the issue before this court is whether the District Court's construction of the statute was right or wrong, not whether it was "so unreasonable" as to constitute an "abuse of discretion." But even if the latter were indeed the appropriate standard of review, we think it clear that, for the reasons set forth in our opening brief and in the remainder of this reply brief, the district court's construction of the statute was so unreasonable

that it abused its discretion in concluding that the carriers had demonstrated "a substantial likelihood of success on the merits."

II. THE CARRIERS' EFFORTS TO DISTORT THE PURPOSE OF THE STRIKE ARE SUPPORTED NEITHER BY JUDGE CORCORAN'S DECISION NOR BY THE RECORD EVIDENCE.

In our opening brief (pp. 11-12) we showed that one reason, and only one reason, prompted the unions to engage in a selective strike: their realization that a nationwide strike would not be permitted by Congress. We then showed that a selective strike in support of multi-employer demands is clearly lawful under the Railway Labor Act, (Id., pp. 24-29).

The carriers, unable to challenge the legality of a selective strike in support of multi-employer demands, elect instead to attribute other purposes to the strike, and then attempt to show that the strike, as thus mischaracterized, was unlawful. More specifically, the carriers repeatedly assert (1) that it was either the purpose or the "inevitable effect" of the selective strike to require the carriers to renounce NRLC as their bargaining representative (Carrier's brief, pp. 2, 9-10, 12 n. 4, 20), and (2) that it was either the purpose or the "inevitable effect" of the strike to obtain individual agreements from individual carriers (Id., pp. 2, 10-11, 12 n. 4, 20). Neither of these contentions is supported by the record evidence, and neither purpose was found by Judge Corcoran. Moreover, the second purpose, even if it had existed, would not have made the strike unlawful.

(1) Choice of Bargaining Representative

There is not one shred of evidence in this record suggesting that the unions sought in any way to interfere with the carriers' continued use of NRLC as their bargaining representative. On the contrary, the unions never requested that any carrier change its bargaining representative, and the affidavit of the unions' chief negotiator stated: "the plaintiff unions categorically deny that it is their purpose to interfere with the carriers' choice of bargaining representatives and the carrier struck on January 31, 1970, is free to designate anyone it chooses to bargain on its behalf" (A. 186). In the face of this undisputed evidence, the carriers offered only the self-serving conjecture of Mr. Farr, of the struck carrier, who asserted in his affidavit: "A strike and picketing of the Union Pacific alone... would place intolerable pressure upon the Union Pacific... to disavow its bargaining representatives in the dispute... and to attempt to negotiate... for the Union Pacific alone through myself or other labor relations officers of the Union Pacific" (A. 195). This assertion is not only self-serving, it is contrary to labor relations experience generally.[3/] The NLRB has fully recognized that there is no reason why a struck employer may not continue to be represented by his multi-employer association, and it has refused to find interference in the selection of bargaining representative simply because a union conducts a selective strike (see our opening brief, pp. 35, 39-40).

Not surprisingly, Judge Corcoran did not find that it was either the "purpose" or the "inevitable effect" of the strike

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3/ Indeed, the record does not even show whether, under the rules of the NRLC, Union Pacific would have been permitted to withdraw at this time.

to require Union Pacific to change its bargaining representative and, although urged by the carriers, he did not find a violation of that section of the Railway Labor Act (Section 2 Third) which forbids a party to "in any way interfere with, influence, or coerce the other in its choice of representatives." It ill behooves the carriers to attempt to sustain Judge Corcoran's injunction on factual assumptions which lack evidentiary support, and which were not found or relied upon by Judge Corcoran.

(2) Individual Contracts

There is likewise no evidence that the unions, by striking Union Pacific, sought to obtain an individual contract from it. It is undisputed, for example, that the unions did not ask Union Pacific to negotiate an individual contract, and that both before and after the strike they participated in national handling. The carriers reason that they obtained their injunction so quickly that the unions had "very little opportunity" to ask Union Pacific to negotiate an individual agreement (Carriers' brief, p. 11, n. 3), but that reasoning is not only a bizarre basis for sustaining an injunction before the request was made, it is contrary to fact. In the past, when the unions have wanted individual agreements they have so requested before striking (Id., p. 11), and it is reasonable to assume that if that is what they had wanted here they would have proceeded in the same manner. Moreover, Judge Corcoran's order did not preclude the unions from seeking individual agreements -- it forbade only selective strikes -- yet the unions continued in national handling, without seeking separate negotiations from Union Pacific at any time. The unions' chief negotiator, in his affidavit, stated that the only reason

for the selective strike was the unions' realization that a nationwide strike would not be permitted. (A. 185-186).

Finally, if the carriers are suggesting that the unions sought a different agreement from Union Pacific than they had sought in national handling, the suggestion is contradicted not only by the evidence, but also by common sense. The unions had plainly manifested a willingness to reach a national agreement through national handling, and they exerted "every reasonable effort" to accomplish just that. Why should they then seek a different agreement from Union Pacific? The answer, of course, is that they had no reason to, and that they did not.

Here, as in the case of their claim regarding selection of bargaining representatives, the carriers sought to rebut facts with self-serving speculation. Mr. Hiltz, of NLRC, stated in his affidavit: "Destruction of the established multi-carrier bargaining unit and negotiation of individual agreements, rather than a national agreement negotiated nationally, almost inevitably will be the result of" the unions' selective strike (Carriers' brief, p. 10). And Mr. Farr, of Union Pacific, asserted that the strike would place "intolerable pressure" on Union Pacific "to attempt to negotiate an individual agreement for the Union Pacific alone..." (A. 195). (It appears that Mr. Farr was saying that Union Pacific would seek an individual agreement, not that the unions were seeking it). But, here again, the speculation appears without foundation,4/ and in any event cannot serve to

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4/ Mr. Hiltz based his prediction on events which had transpired in the "crew consist" dispute, involving another union. But there the union had refused to participate in national handling, and had insisted on negotiating on a carrier-by-carrier basis. To conclude that the same outcome is "almost inevitable" here -- where the unions had engaged in national handling, were not opposed to a national settlement, and were agreeable to continued national handling -- is preposterous.

deprive the unions of a right to strike which they enjoy under the Railway Labor Act.

Judge Corcoran did not find that individual agreements were either the "purpose" or the "inevitable effect" of the selective strike. Indeed, he appeared to regard this as irrelevant to his decision. His holding was that selective strikes, following national handling, are unlawful irrespective of the purpose of the strike,[5/] and his injunction, consistent with that holding, enjoined selective strikes irrespective of their purpose (A. 349-350).

Thus, based upon the record evidence, Judge Corcoran's findings, and the order which he entered, the issue before this Court is whether a union violates the Railway Labor Act by engaging in a selective strike in support of its multi-employer demands. Nevertheless, we are compelled to point out that even if the purpose of the strike were to secure individual agreements, it would have been lawful (see our opening brief, pp. 30-31, 34-43, and this reply brief, pp. 11-19 infra).

III. ANALOGIES FROM THE NATIONAL LABOR RELATIONS ACT.

The carriers have done a complete flip-flop with respect to the significance of NLRA decisions in determining the right

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5/ As posed by Judge Corcoran, the issue he had to decide was "whether, after national handling of a dispute has failed to produce an agreement, a strike against an individual carrier who has been part of the multi-employer bargaining unit is legal" (A. 341). Judge Corcoran's resolution of this issue was as follows: "Considering the history of national handling of this and past disputes and the present pattern of negotiations, the shopcraft unions' action in striking an individual carrier exhibits bad faith..." (A. 344).

to strike under the Railway Labor Act. In the district court, it was the carriers who urged that NLRA decisions be looked to. They argued that those decisions "provide strong support for" their position[6] and suggested that they were "useful" in interpreting the Railway Labor Act (A. 167). The carriers succeeded before Judge Corcoran, who relied in his decision upon what he conceived to be the holdings under the NLRA (as stated to him by the carriers in their briefs to him[7]).

In their brief to this Court, the carriers are whistling a different tune. Now they say that the discussion of decisions under the NLRA "is far more lengthy than the subject deserves in this case arising under the Railway Labor Act" (page 42). They bother to discuss these decisions at all, they say, only "in fairness to Judge Corcoran" (Ibid.). And they insist that this is an area where analogies should not be drawn from the NLRA (pages 33-34).

The fact that the carriers are scurrying for cover is an eloquent sign that they are now persuaded that the NLRA cases support us, not them. If further proof were necessary, it is furnished by the carriers' abysmal effort to draw comfort from the NLRB decisions (pages 34-40).

In our opening brief, we demonstrated that the NLRB cases stood for two propositions relevant to this case:

6/ Carriers' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction Against Strike by Shopcraft Unions, Page 19.

7/ See n. 6, supra.

(1) That unions may selectively strike some of the employers in a multi-employer unit in support of their demands for a multi-employer contract (Brief for Appellant, pp. 34, 37-38); and,

(2) That, once impasse has been reached, unions may seek individual contracts from members of the multi-employer unit (Id., pp. 36-37, 38-42).

The carriers' brief makes no effort whatsoever to challenge the first of these two propositions. At no point do they cite a case which even they claim stands for the proposition that a selective strike in support of a multi-employer contract is unlawful. Since that was, indeed, the sole purpose of the strike in the instant case, the NLRB cases indisputably support us. All of the carriers' efforts are devoted to an attempt to undermine the second of the propositions, i.e. that unions may seek individual contracts following impasse in multi-employer negotiations. We show below that the carriers' efforts even on this point are unavailing.

The carriers begin by asserting that Morand, which we cited as the "leading case under the NLRA", is a "thoroughly discredited" decision (Carriers' brief, page 34). This is sophistry at its best. Those aspects of Morand upon which we rely have been adhered to uniformly; another aspect of Morand, not germane here, has been discredited. In Morand, the Board held (1) that selective strikes are lawful; (2) that, following impasse, a union may seek individual contracts; and (3) that an employer lockout

in response to a selective strike (i.e. a "defensive lockout") is unlawful. The Seventh Circuit affirmed the first two of these propositions, but reversed the third (see our opening brief, pp. 36-37, and 37 n. 23). The Board itself later reversed the third proposition, and held defensive lockouts to be unlawful, Buffalo Linen Supply Co., 109 NLRB 447 (1954), and the Supreme Court affirmed that view, Labor Board v. Truck Drivers Union, 353 U.S. 87 (1957). But in the course of doing so, the Supreme Court confirmed the correctness of the first two propositions enumerated in Morand (see our opening brief, p. 41).

The carriers then proceed (brief, pp. 39-40) to cite a number of Board decisions which they claim undermine the second Morand proposition -- i.e. the right of a union to seek individual contracts following impasse. These cases all held, according to the carriers (id., p. 40), " that a union violated Section 8(b)(1)(B) or Section 8(b)(3) or both where it sought to break up an established multi-employer bargaining unit and coerce the members of that unit into making individual agreements by means of selective or whipsaw strikes." But, as the carriers virtually concede (Id., p. 40), none of these cases is in point.

In several of the cases cited by the carriers, the unions sought individual contracts long before impasse had been

reached[8]; in others, the union claimed that impasse had been reached, but the Board, acknowledging the significance of that fact if proved, concluded that it was not[9]; and the remainder involved solely a union's effort to force an employer to discard an association as his bargaining representative, a violation of Section 8(b)(1)(B) whether it occurs before or after impasse.[10]

8/ Local Union 49 of the Sheet Metal Workers, 122 NLRB 1192 (1959) (union refused to meet at all with multi-employer association, and demanded individual contracts from the outset); General Teamsters Local Union No. 324, 127 NLRB 488 (1960)(negotiations were "progressing fruitfully", and association was about to make a "package proposal" when unions demanded individual contracts); Hoisting & Portable Engineers Local 701, 141 NLRB 469 (1963) (parties had not yet begun "serious bargaining" on some issues when union demanded individual contracts); Int'l. Union of Operating Engineers, Local 825, 145 NLRB 952 (1964)(negotiations just beginning when union demanded individual contracts); Painters Local No. 823, 161 NLRB 620 (1966)(multi-employer contract in mid-term, and not open for negotiation at all, at point at which union demanded new, individual agreements); Enterprise Association, 170 NLRB No. 44 (1968)(parties had reached handshake agreement on new multi-employer contract, and while it was being reduced to writing union demanded individual agreements instead).

9/ In Westchester County Executive Committee, 142 NLRB 126 (1963), the Board found that no impasse had been reached, and added "we do not reach" the question whether the union's "conduct would have been lawful if the parties had reached an impasse in bargaining." 142 NLRB at 126, n. 1. In Local 964, United Brotherhood of Carpenters and Joiners, 181 NLRB No. 154(1970), the Board adopted the following analysis of its Trial Examiner:

> "As to the solicitation of such members to execute separate contracts after July 19, Respondent contends that such solicitation was not unlawful because it occurred... after an impasse in bargaining...
>
> "However, there was no impasse in fact on July 19... It is only when the parties have reached an impasse after exhausting the possibilities of good-faith bargaining that they are free to engage in unilateral action." (Id. at TXD, p. 14).

10/ In Ice Cream, Frozen Custard Employees, Local 717, 145 NLRB 865 (1964), the Board found that a union violated Section 8(b)(1)(B) by insisting, after impasse, that the employer appear at the bargaining table himself instead of designating the association as his negotiator. Although the union also demanded that the employer sign an individual contract, the General Counsel did not even allege that the union thereby violated Section 8(b)(3). Similarly, in the following cases, a union was found to have violated Section 8(b)(1)(B), either before or after impasse, by insisting that the employer

(Cont'd.)

In none of the cases cited by the carriers did the Board hold, or even intimate, that a strike for individual contracts following impasse would be unlawful. Whenever the Board has dealt with that question, it has held that such strikes are lawful (see cases cited at pp. 38-39 of our opening brief), and so did the Supreme Court in Buffalo Linen (see Id., at p. 41).

IV. CONSTRUING THE RAILWAY LABOR ACT

The carriers' argument under the Railway Labor Act consists in equal measure of misstating our position, and building a monument to a dictum appearing in this Court's decision in Brotherhood of Railroad Trainmen v. Atlantic Coast L. R. Co., 127 U.S. App. D.C. 298 383 F.2d 225 (1967). We first correct the misstatements, and then discuss Atlantic Coast Line.

(1) Correcting the Carriers' Misstatements of our Position

The carriers accuse us of changing positions. They assert that in the district court we argued that the unions' right to engage in selective strikes attached when the statutory procedures were exhausted, while here we argue that the right attached when negotiations reached an "impasse" (Carriers' brief, pp. 25-27).

10/Cont'd. -- not use the association as his negotiator. Operative Plasterers, Local No. 2, 149 NLRB 1264 (1964); Orange Belt Dist. Council of Painters No. 48, 152 NLRB 1136 (1965); United Slate, Tile & Composition Roofers, 172 NLRB No. 249 (1968). Indeed, in United Slate the employer had withdrawn from the multi-employer unit, but still wished to have the association negotiate for him. The union's interference therewith was held unlawful.

Of course we have done no such thing. Our opening brief contended that exhaustion of the statutory procedures under the Railway Labor Act is the equivalent of arriving at impasse under the NLRA, and that accordingly rights which become available under the NLRA at the time of impasse should become available under the Railway Labor Act when the statutory procedures have been exhausted. Lest the carriers' misstatements leave confusion about our position, we quote from our opening brief, p. 42, where we stated that the Railway Labor Act:

> "... provides its own definition of the date upon which employers become entitled to make unilateral changes -- 30 days after issuance of the emergency board's report -- and, likewise, that should be the date upon which unions, having unsuccessfully sought agreement through national handling, should be free to seek contracts from individual carriers. Thus, under the Railway Labor Act, the courts need not become entangled in the thorny question -- necessary under the NLRA -- of determining when an "impasse" has occurred in fact. See, e.g. American Federation of Television Artists v. NLRB, 129 U.S. App. D.C. 299 395 F.2d 622 (1968). Of course, even if this Court were to look for an "impasse" in the NLRA sense, it would have to conclude that in this case an impasse had been reached. The Secretary of Labor himself, testifying before the Senate Labor Committee two days after the injunction below had issued, confirmed that the parties were hopelessly deadlocked (see p. 19, supra)."

The carriers' brief (p. 31, n. 18) also contains the following misstatement:

> "The... union suggests at one point (Br., at 25-26) that the carriers will not bargain in good faith if they know that the courts will prohibit whipsaw strikes under the Railway Labor Act... In addition to its irrelevancy, that argument is without basis in the record or in reason".

What the carriers fail to mention is that this is not our suggestion; at the cited pages of our brief we are quoting from the Supreme Court's decision in Railroad Trainmen v. Terminal Co., 394 U.S. 369, 380-381(1969), that the "disputant's positions in the course of negotiation and mediation and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a /court/ would, say, prohibit the employees from striking..." The carriers are entitled, if they wish, to brand this analysis as "without basis... in reason," but in fairness they ought to identify the correct author.

Quite hypocritically, in light of their attack upon the Supreme Court's prediction that the carriers' bargaining would be affected by a diminution of the weapons available at the end of the line, the carriers are quick to assert, on the very next page (p. 32), that "permitting whipsaw strikes after an impasse would place a premium on conduct causing an impasse, and thus would encourage a failure to bargain in good faith." If we correctly understand the carriers' position, they are assuring this Court that they will bargain in good faith even if the unions are stripped of all economic power, but that the unions will not bargain in good faith even if allowed the limited right to strike which we seek to preserve in this case. These arguments, we believe, are more properly addressed to Congress, which -- however distasteful to the carriers -- envisioned the

strike as "the ultimate sanction of the union" under the Railway Labor Act. Railway Clerks v. Florida E. C. Ry. Co., 384 U.S. 238, 244. See also Railroad Trainmen v. Terminal Co., supra, 394 U.S. at 384.

(2) Atlantic Coast Line

The carriers argue that this Court held in Atlantic Coast Line that as to certain subjects national handling is "obligatory"; that the disputed issue in this case is one requiring obligatory national handling under Atlantic Coast Line; and that the necessary implication of that decision is that, following exhaustion of the statutory procedures, unions cannot engage in selective strikes. (Carriers' brief, pp. 21-25, 31-33). Each of these contentions is wrong.

In Atlantic Coast Line, a union insisted from the outset that it would not engage in national handling over a "crew consist" dispute. The carriers brought an action alleging that the union was required to engage in national handling, and that the Railway Labor Act precluded a strike unless the union first participated in national handling. The district court agreed with the carriers, and enjoined a strike. This court reversed.

In its opinion this Court noted that there was no history of national handling with respect to crew consist disputes, and that neutral experts believed it would be "wholly unrealistic" to formulate a national crew consist rule. 383 F.2d 225 at 229. In light of these factors, this Court concluded that neither party could require the other to engage in national handling of the issue. Ibid.

In the concluding paragraph of its opinion, however, this Court appended a dictum which is the launching point for the carriers' arguments in the instant case:

> "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue." (383 F.2d at 229).

The carriers argue that this dictum means that national handling is required as to some issues; that the "incidental work rule" is such an issue; and that the necessary implication of this dictum is that following exhaustion of the statutory procedures on a national handling basis a union may not engage in a selective strike.

There are a number of holes in the carriers' reasoning. In the first place, its reading of the Atlantic Coast Line dictum to limit the forms of self-help following exhaustion of the statutory procedures is totally unwarranted. At most, the dictum suggests that there are some issues as to which the method of pursuing the statutory procedures must be national handling. There is not one word in the opinion discussing the options available to the parties once national handling has been pursued to exhaustion. And the author of the Atlantic Coast Line dictum has stated, in a sub-

sequent decision, that once the statutory procedures havebeen exhausted, the Act's provisions "do not spell out limitations on the way in which economic warfare is to be conducted..." Inter-National Association of Machinists v. National Mediation Board, --- U.S. App. D.C. ---, 425 F.2d 527, 533 (1970). Thus even if the dictum in Atlantic Coast Line were a correct interpretation of the Railway Labor Act, and even if the dispute in the instant case were one as to which national handling were required, it does not follow at all from Atlantic Coast Line that selective strikes are unlawful.

Because this is so it is entirely unnecessary for the court to decide in this case whether the Atlantic Coast Line dictum is correct, nor whether this dispute required national handling. Nevertheless, because the carriers make so much of these points, and misconstrue our position on them, a brief response is required.

The carriers' brief (p. 31) attributes to us a "concession that the instant dispute is one as to which multi-carrier bargaining is obligatory under the Act as construed in Atlantic Coast Line." Quite the contrary, our opening brief stated (p. 16, n. 16):

> "Prior to this dispute, there had been no national handling of 'incidental work' disputes for nearly 50 years (A. 12-13), and such accommodations as had been reached during that period had been accomplished on a single carrier basis (A. 81). In light of that history, national handling was not required /under/... Atlantic Coast Line."

Indeed, Judge Corcoran did not find a history of national handling of "incidental work" disputes, either. He simply concluded that

because wage issues had been handled on that basis, so must the "incidental work" dispute (A. 342-343). This is, of course, a complete non sequitur, and does not meet the standards of the Atlantic Coast Line dictum.

The carriers' brief (page 29) also attributes to us a concession that the dictum in Atlantic Coast Line is a correct statement of the law. Again, we made no such concession. Indeed, we believe the Atlantic Coast Line dictum to be entirely wrong. To start with in the nearly forty-year history of the Railway Labor Act in its present form, no court had ever before held national handling to be obligatory as to any dispute. As this court acknowledged in Atlantic Coast Line, the Railway Labor Act (unlike the National Labor Relations Act) does not even permit certification on a multi-carrier basis (p. 228); the National Mediation Board will not docket a negotiating dispute for mediation on a national handling basis over the objection of either party (p. 227); and the parties to railway negotiations have always assumed that national handling is a voluntary approach which either party can refuse (pp. 228-229).11/ To the extent

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11/ For these reasons, the carriers' repeated allusions to "multi-employer" bargaining in the sense that that term is used under the NLRA are misleading. The Railway Labor Act does not countenance multi-employer units. "National handling" is a voluntarily-adopted format which ought not to be encumbered by the rigid requirements imposed upon multi-employer bargaining under the NLRA, let alone by the even greater rigidity contemplated in the Atlantic Coast Line dictum. Cf. Retail Clerks Union v. NLRB, 117 U.S. App. D.C. 191, 330 F.2d 210 (1964).

that the NLRA provides a useful analogy, it does not require multi-unit negotiations over the objection of one of the parties, AFL-CIO Joint Negotiating Committee for Phelps-Dodge, 184 NLRB No. 106, 74 LRRM 1705 (1970), and permits timely withdrawal by either party from multi-unit negotiations irrespective of a prior history of negotiating on a multi-unit basis (see cases cited at p. 38 of the carriers' brief). Thus, we respectfully submit that the Atlantic Coast Line dictum represents a judicial innovation which is not justified by the Railway Labor Act itself, the prior interpretations of that Act, or any other consideration of national labor policy. The views of this Court, or indeed of any court, that particular issues can be better negotiated on a national rather than individual basis, should not be converted into a judicial requirement that the parties bargain accordingly.

CONCLUSION

For the reasons set forth above and in our opening brief, the decision of the court below should be reversed.

Respectfully submitted,

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